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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JOSEPH KEEFE, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

On March 1, 2011, this Court issued *Henderson v. Shinseki*, 2011 WL 691592 (U.S.), establishing four factors for determining whether a provision has "jurisdictional consequences" or is a "claim-processing rule."

1. Do the *Henderson* factors, which concerned the Veterans Court, also apply to the Tax Court? If so, then is 26 U.S.C. §6226(d)(1)(B) jurisdictional for pre-1997 tax years or is it merely a claim-processing rule the Tax Court and Federal Circuit may ignore?

Henderson relied on *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), which relied on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), in which the Court rejected the exercise of "hypothetical jurisdiction" and warned against conflating merits with jurisdiction.

2. Did dismissal of these cases as "claims attributable to partnership items" rest on hypothetical jurisdiction and conflate merits with jurisdiction?

PARTIES TO THE PROCEEDINGS BELOW

This is a consolidated petition arising from 53 separate appeals before the Court of Appeals for the Federal Circuit, some with multiple appellants. The following were parties to those 53 cases below:

Petitioner	Docket No.
Acker, Nadine J., Indiv. and as Rep. of the Estate of George M. Acker . . .	2008-5161
Adams, Samuel and Cornelia T. .	2008-5168
Anderson, Robert E. and Marguerite M.	2008-5151
Aylward, Thomas J. and Sharon G.	2008-5143
Baer, Maurice E., Indiv. and as Exec. of the Estate of Hazel S. Baer)	2008-5165
Barfield, Terry W. and Virginia S.	2008-5165
Berman, Robert A. and Sylvia M.	2008-5164
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Brady, Robert L. and Martha F. .	2008-5156
Caldwell, Bruce W. and Susan . .	2008-5154

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Cox, H. Dean and Laura M. 2008-5151
Crocker, Jesse W.
and Patricia M. 2008-5147
Cronin, Daniel M. and Carol L. . 2008-5151
Crouse, Betty J. 2008-5146
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Davidson, Arthur J.
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Dhillon, Charanjit Singh
and Mandy K. 2008-5172
Dos Reis, Acacio
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Dow, Ruth A. 2008-5155
Dykes, Martha H. 2008-5145
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and Marilyn 2008-5159
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OPINIONS BELOW

Following entry of judgment and decision in *Prati v. U.S.*, 81 Fed.Cl. 422 (2008) ("*Prati* I"), judgments dismissing for lack of jurisdiction were summarily entered by the Court of Federal Claims in each of these 53 cases. App:41-95.[1] Reconsideration was denied in *Prati v. U.S.*, 82 Fed.Cl. 373 (2008) ("*Prati* II"). App:22-40. The Federal Circuit affirmed at *Prati v. U.S.*, 603 F.3d 1301 (Fed.Cir. 2010) ("*Prati* III"). App:1-21. The Federal Circuit then summarily affirmed all 53 dismissals here. App:116-119.

JURISDICTION

The Federal Circuit summarily affirmed on December 9, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The relevant constitutional provisions,

[1] References to "App:x" are to page "x" of the attached Appendix.

statutes, and regulations are set forth in the appendix.

STATEMENT OF THE CASES

Between 1997 and 2002, as applicable, the IRS assessed tax and interest against limited partners based on their partnership investments in one or more AMCOR-related partnerships, which were subject to TEFRA.[2] The tax years at issue are 1984, 1985, and 1986, as applicable. Many partners, including petitioners, paid the liability and filed refund claims, asserting (for 1984 and 1985) the IRS assessed after limitations expired and (for 1984, 1985 and 1986) penalty interest was imposed in violation of §6621(c)[3] and Treas. Reg. §301.6621-2T, A-5. App:129-130, 132-135. The IRS denied their claims. They timely filed suits in the Court of Federal

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[2] 26 U.S.C. §§6221-6233, as enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324; see *Maxwell v. C.I.R.*, 87 T.C. 783, 787 (1986) (*en banc*).

[3] Unless otherwise indicated references to section and § are to the Internal Revenue Code (26 U.S.C.).

Claims under the general refund jurisdiction of 28 U.S.C. §§1346(a) and 1491(a).

The AMCOR-related suits were assigned to multiple judges. These 53 were assigned to Judge Block.

The parties chose *Prati* as a representative case for selected issues. The partners and the United States chose not to consolidate or stipulate to be bound by the outcome of *Prati*. Instead, their cases and others were stayed pending the final outcome of *Prati*, which would then be applied to each partners' facts. By agreement between the parties and the Court of Federal Claims, most cases were stayed upon filing. Consequently, the United States answered only 3 of these 53 suits. No records were developed. Aside from materials initially filed with some complaints, no documents or testimony were presented.

Keener, a later filed case, was assigned to Judge Allegra and not chosen as a representative case. Judge Allegra refused to stay *Keener* and issued an opinion (*Keener* I)[4]

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[4] *Keener v. U.S.*, 76 Fed.Cl. 455 (2007) ("*Keener* I"), *aff'd.*, 551 F.3d 1358 (Fed. Cir. 2009) ("*Keener* II"), *cert. denied* 130 S.Ct. 153 (2009).

dismissing those partners' limitations and penalty interest claims for lack of jurisdiction. *Keener* I was appealed to the Federal Circuit. Petitioners then added *Keener* as a representative case.

In April 2008, before the Federal Circuit ruled on *Keener* I, the Court of Federal Claims granted the United States' motion and dismissed the Pratis' claims for lack of jurisdiction (*Prati* I). App:94. *Keener* I and *Prati* I both dismissed the limitations and penalty interest claims for lack of jurisdiction, but on different and inconsistent analyses.

In *Prati* I, Judge Block also summarily dismissed and entered judgments in all of the relevant AMCOR cases then-stayed before him,[5] including petitioners' 53 suits, without regard to the pending *Keener* appeal or the parties' agreements as to representative cases. App:42-43 n.2. The Pratis moved for reconsideration, and petitioners moved to have their judgments vacated and their suits either

(i) re-stayed pending the final outcome of

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[5] Other AMCOR-related cases before Judge Block do not concern limitations or §6621(c) penalty interest.

the *Keener* and *Prati* appeals, as previously agreed; or

(ii) consolidated for a single judgment allowing a single appeal.

Despite its prior representations, the United States opposed. The Court of Federal Claims denied relief, forcing 55 separate appeals, including the Pratis and the Deegans. *Prati* II. App:39. Petitioners appealed to the Federal Circuit pursuant to 28 U.S.C. §1295(a)(3).[6]

The Federal Circuit granted petitioners' motion to stay their appeals until the outcome of the *Keener* appeal. [Entry:9].[7] In January 2009, the Federal Circuit entered *Keener* II, affirming the Court of Federal Claims' dismissal of those limitations and penalty interest claims, but on analyses different from and inconsistent with the Court of Federal Claims' opinions in *Keener* I, *Prati* I, and

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[6] As of this filing, the other roughly 35 relevant AMCOR-related suits not assigned to Judge Block remain stayed in the Court of Federal Claims before eight different judges.

[7] [Entry:x] refers to Entry "x" in the appeal for petitioner Keefe (Fed.Cir. 2008-5116).

Prati II.

The United States moved to summarily affirm the Court of Federal Claims' dismissals in all 55 appeals (including *Prati* and *Deegan)* based on *Keener* II. [Entry:10]. Petitioners opposed and moved to stay, arguing, *inter alia*, that they never agreed to be bound by the outcome of *Keener*, and their cases were distinguishable on the facts and the law.[8] [Entry:15]. The Federal Circuit granted their motions and ordered briefing in *Prati* and *Deegan* as representative cases. [Entry:19]. The court denied the United States' motion for summary affirmance without prejudice to raising the issue again on brief. [Entry:20].

The partners in *Keener* filed a petition for writ of certiorari, which was denied on October 5, 2009.

Separate briefs were filed for the Prati and Deegan appeals. On May 5, 2010, the Federal

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[8] Shortly after *Keener* II was issued then-Chief Judge Hewitt of the Court of Federal Claims recognized that it is of little or no precedential value because it was founded on concessions purportedly made by those partners. *Alpha I, L.P. v. U.S.*, 89 Fed.Cl. 347, 359 (2009).

Circuit issued its combined opinion at *Prati* III. The Federal Circuit again rejected the United States' argument for summary affirmance holding:

> A representation that a pending case should be dispositive . . . does not deprive parties of the right to argue that the ensuing decision failed to settle all the issues to be resolved in their case.

[App:9]

The Federal Circuit also affirmed the Court of Federal Claims' dismissal of the Pratis' and Deegans' limitations and penalty interest claims but, again, on analyses different from and inconsistent with those in *Keener* I, *Keener* II, and *Prati* I.

As to limitations, the Federal Circuit authorized what it perceived as the Tax Court's *sua sponte* expansion of its jurisdiction to a class of persons that Congress had expressly barred by statute. The Federal Circuit held, *inter alia*, those partners could not assert their limitations period in a partner-level refund suit because they were required to have raised it in the prior partnership-level Tax Court suits. App:16-17 and n.4. But for

pre-1997 tax years the plain language of §6226(d)(1)(B) bars partners with expired assessment periods from participating in partnership-level suits. App:123. Although briefed, the Federal Circuit essentially ignored that express jurisdictional bar and, buried in a footnote, held that amendments effective only for tax years ending after August 5, 1997 "merely codified prior practice of the Tax Court" and, therefore, those partners had been "free to participate in the partnership-level proceedings." App:16-17 and n.4.

As to penalty interest, the Federal Circuit never analyzed whether it is properly classified as a partnership item or an affected item – a prerequisite to determining which court (partnership-level or partner-level) has jurisdiction in TEFRA's complex procedural scheme. Rather, it held that to *apply* a previously-determined partnership item in a subsequent partner-level refund suit is *per se* to challenge that prior determination, requiring that the partnership item be re-determined, which §7422(h) denies jurisdiction to do. App:17-21.

After *Prati* III, the United States moved to consolidate all 53 appeals "for purposes of

further proceedings and disposition." [Entry: 22]. The Federal Circuit denied the United States' motion, except to allow a single response to be filed (under a combined style) pursuant to a prior order. [Entry:25]. App:113-115. The 53 appeals were never consolidated. App:117.

Petitioners and the United States then filed separate responses notifying the Federal Circuit of how they believed the 53 appeals should proceed. Petitioners argued that one or more representative cases be chosen to resolve the issues created by *Prati* III, including, *inter alia*, the Federal Circuit's failure to address the jurisdictional consequences of pre-1997 §6226(d)(1)(B) and conflation of merits and jurisdiction as to both limitations and penalty interest. [Entry:27]. The United States argued that all 53 Court of Federal Claims dismissals should be summarily affirmed based on *Prati* III. [Entry:26]. Petitioners opposed, asserting, *inter alia*, that

- as to limitations, by imposing on petitioners §7422(h)'s jurisdictional bar (no jurisdiction in *partner*-level suits for refunds attributable to partnership items) without resolving pre-1997

§6226(d)(1)(B)'s jurisdictional bar (no jurisdiction in *partnership*-level suits for partners with expired assessment periods), *Prati* III created multiple constitutional violations and statutory conflicts; and

- as to both limitations and penalty interest, *petitioners'* claims could not be resolved by *Prati* III because that jurisdictional ruling impermissibly conflated merits with jurisdiction and because *their* facts were never developed.

[Entry:28].

The Pratis and Deegans filed separate petitions for writ of certiorari. Before the outcome of those petitions and without addressing the conflicts created by *Prati* III's jurisdictional holdings, the Federal Circuit summarily affirmed all 53 dismissals on December 9, 2010. [Entry:32]. App:116-119. This Court denied both petitions on January 10, 2011. 131 S.Ct. 937 and 940.

On March 1, 2011, this Court issued *Henderson v. Shinseki*, 2011 WL 691592 (U.S.), unanimously articulating four factors the

Federal Circuit should have applied to determine both the jurisdictional consequences of pre-1997 §6226(d)(1)(B) and the scope of §7422(h)'s jurisdictional bar to "refund[s] attributable to partnership items."

REASONS TO GRANT THE PETITION

On March 1, 2011, after the Federal Circuit summarily affirmed the dismissal of all 53 cases, this Court issued *Henderson*, articulating four factors that determine whether a provision has "jurisdictional consequences" or is merely a "claim-processing rule." App:96-112. *Henderson* directly applies in all 53 cases to both petitioners' limitations and penalty interest claims.

Certiorari should be granted, all 53 judgments should be vacated, and this Court should (i) apply the *Henderson* factors to determine the jurisdictional consequences of pre-1997 §6226(d)(1)(B), and (ii) apply *Henderson* and this Court's additional precedent in *Arbaugh* and *Steel*, to reverse the lower courts' "drive-by jurisdictional rulings"

and "hypothetical judgements"[9] and stop the self-perpetuating conflation of merits and jurisdiction in this complex area of taxation.

Certiorari would also afford an opportunity to finally resolve a judicial quagmire plaguing every court with refund jurisdiction: the scope of §7422(h)'s prohibition to the exercise of general refund jurisdiction under 28 U.S.C. §§1346(a)(1) and 1491(a)(1).

After the lower courts' actual jurisdiction is established, these cases should be remanded to determine the merits of petitioners' claims with instructions, as appropriate.

1. **The Intervening *Henderson* Opinion Controls the Jurisdictional Consequences of Pre-1997 §6226(d)(1)(B)**

"For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." App:102. These 53 cases concern TEFRA's complex provisions controlling where and when specific partnership-related tax claims can be raised and turn on whether

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[9] *Steel*, 523 U.S. at 91 and 101.

those provisions are jurisdictional or address the merits of a party's claim/defense.[10] "This question is not merely semantic but one of considerable practical importance for judges and litigants." App:101.

Because the line between jurisdiction and merits is so often conflated, this Court in *Arbaugh* described the general approach to distinguish jurisdictional conditions from claim-processing requirements or elements of a claim. It applied a "readily administrable bright line" rule: is there any clear indication that Congress intended the provision to be jurisdictional?[11] Unfortunately, the "drive-by jurisdictional rulings" continued – as evidenced by these cases – so in *Henderson* this Court has now specifically articulated four factors to determine when a timing provision is jurisdictional.

Like *Henderson*, these cases involve jurisdiction of Article I tribunals within a unique administrative scheme. There, this Court held that the 38 U.S.C. §7266(a) deadline to appeal to the Veterans Court is not

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[10] *Arbaugh*, 546 U.S. at 510.

[11] *Id.*, at 515-516.

jurisdictional. App:112. Here, petitioners' cases address where and when, within TEFRA's procedural scheme, petitioners were allowed/required to raise their §6501(a)-based limitations defenses or refund claims and §6621(c) penalty interest claims. The options are either

(i) in the partnership-level Tax Court suits, or

(ii) in these partner-level refund suits.

The Federal Circuit held that those issues could be raised only in the partnership-level Tax Court suits. App:16 and 19. But the Federal Circuit:

(i) as to limitations, failed to address the existence, plain language, and purpose of §6226(d)(1)(B)'s jurisdictional bar for pre-TEFRA tax years and;

(ii) as to both issues, conflated §7422(h) and §6221 as to jurisdiction and merits.

Therefore, at issue here is whether the Tax Court in partnership-level suits had personal jurisdiction over these petitioners and subject matter jurisdiction to determine every element of their post-payment refund claims.

When the *Henderson* factors are applied here it is clear that

- pre-1997 §6226(d)(1)(B) is a jurisdictional bar that no court (neither the Tax Court nor the Federal Circuit) may circumvent, and
- where, as here, a partner's refund is attributable to an affected item, §7422(h) cannot bar the *entire* claim even though §6221 does bar jurisdiction to *now* determine the merits of any partnership-item elements.

a. Under *Henderson*, Pre-1997 §6226(d)(1)(B) Is Jurisdictional

The Federal Circuit never addressed whether the Pratis' and Deegans' §6501(a)-based assessment periods expired before the partnership-level Tax Court suits were filed. Rather, it held, *inter alia*, that they could not raise their limitations claims in partner-level refund suits because they were required to have raised them in the prior partnership-level Tax Court suits. App:16.

In the Court of Federal Claims and again in the Federal Circuit the Pratis asserted that the jurisdictional consequences of pre-1997

§6226(d)(1)(B) denied them jurisdiction to participate in the partnership-level Tax Court suits to raise their limitations claims. In petitioners' responses to the United States' motions to summarily affirm the dismissals, they informed the Federal Circuit of *Prati* III's failure to address those jurisdictional consequences. Both courts simply ignored pre-1997 §6226(d)(1)(B)'s plain language. [Entry:28 p. 1-2, 5-6, 10-12].

i. Pre-1997 §6226(d)(1)(B) is Jurisdictional Under *Henderson*'s First Three Factors

The first three *Henderson* factors to determine the jurisdictional consequence of a provision are whether

(i) the provision itself provides clear evidence that it was meant to carry jurisdictional consequences;

(ii) the provision's placement within its relevant procedural framework indicates that it was meant to carry jurisdictional consequences; and

(iii) within the relevant procedural framework, there is a separate provision that addresses jurisdiction.

App:107-109.

All federal courts are courts of limited jurisdiction.[12] Those limits apply with added force to Article I courts.[13] The Tax Court, an Article I court, exercises jurisdiction only to the extent authorized by Congress.[14]

Congress established TEFRA's procedural scheme defining the legal obligations and duties of the IRS and the partners, the class of persons entitled to enforce those duties, and each court's appropriate jurisdiction to resolve disputes based on the nature of the controversy.

In partnership-level suits there is no broad "umbrella provision" for jurisdiction as there is for general civil litigation[15] or general tax

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[12] *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978).

[13] *U.S. v. Denedo*, —U.S.—, 129 S. Ct. 2213, 2221, 173 L.Ed.2d 1235 (2009).

[14] §§7441 and 7442. App:131. *Naftel v. C.I.R.*, 85 T.C. 527, 529 (1985).

[15] 28 U.S.C. §1331.

refund litigation.[16]

Section 6226 is titled "Judicial Review of Final Partnership Administrative Adjustments." It is the only relevant statute, within TEFRA or otherwise, that grants jurisdiction to courts in partnership-level suits.[17] For pre-1997 tax years, §6226(f) grants limited subject matter jurisdiction – only to determine and allocate partnership items. App:125. Only §6226(c) grants personal jurisdiction, which §6226(d) then limits:

> (c) PARTNERS TREATED AS PARTIES.—If an action is brought under subsection (a) or (b) with respect to a partnership for any partnership taxable year—
>
> (1) each person who was a

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[16] 28 U.S.C. §§1340, 1346(a)(1), and 1491(a)(1).

[17] The §6228 provisions regarding judicial review of administrative adjustment requests are relevant only in that they mirror the language of §6226(c) and (d)(1), thereby supporting petitioners' arguments here. §6228(a)(4). Section 6221 generally requires that partnership items be determined at the partnership level, barring courts from determining partnership items in partner-level suits.

> partner . . . during such year shall be treated as a party to such action, and
>
> (2) the court having jurisdiction . . . shall allow each such person to participate . . . .
>
> (d) PARTNER MUST HAVE INTEREST IN OUTCOME.—
>
> (1) IN ORDER TO BE PARTY TO ACTION.—Subsection (c) *shall not apply* to a partner *after the day* on which—
>
> . . . .
>
> (B) *the period within which any tax* attributable to such partnership items *may be assessed against that partner expired.*
>
> . . . .

App:123 (emphasis added).

Section 6226(c) is the only statute that allows partners other than the TMP to participate in partnership-level suits, *i.e.*, that grants personal jurisdiction. For pre-1997 tax years, §6226(d)(1)(B) states that §6226(c) "shall not apply" to partners after their

assessment deadline expires. It speaks in jurisdictional terms and is unambiguously framed as an express limit on the authority of the reviewing tribunal.[18]

Congress placed §6226(d)(1)(B)'s express limit on the class of persons entitled to participate in partnership-level suits[19] squarely within the *only* provision that delineates the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's partnership-level TEFRA-related adjudicatory authority.[20] This placement and unambiguous

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[18] Congress may enact separate provisions that expressly restrict application of a jurisdiction-conferring statute. See, *e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 756-761, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975) (42 U.S.C. § 405(h) bars exercise of 28 U.S.C. §1331 jurisdiction over suits to recover Social Security benefits).

[19] This Court recognizes that a provision is no less "jurisdictional" when Congress prohibits federal courts from adjudicating an otherwise legitimate "class of cases." *Bowles v. Russell*, 551 U.S. 205, 212-13, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007).

[20] See *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004).

language clearly evidences Congress' intent that §6226(d)(1)(B) carry jurisdictional consequences. Therefore, pre-1997 §6226(d)(1)(B) is jurisdictional under *Henderson*'s first three factors.

ii. Pre-1997 §6226(d)(1)(B) is Jurisdictional Under *Henderson*'s Fourth Factor

In *Henderson*, this Court placed primary emphasis on its fourth factor: whether holding a provision is jurisdictional supports or conflicts with the specific goals Congress sought to achieve with the relevant procedural scheme. App:109.

Here, holding that pre-1997 §6226(d)(1)(B) is jurisdictional supports TEFRA's procedural scheme for pre-1997 tax years.

(1) *TEFRA Bifurcates Merits Determinations of Partnership Items and Nonpartnership Items*

At the cornerstone of TEFRA are three categories: partnership items, nonpartnership items, and affected items. Oversimplified, a partnership item is any item that "affects the partnership as a whole." Everything else is a nonpartnership item.

Affected items are "any item to the extent such item is affected by a partnership item."[21] Until *Prati* III, 25 years of unbroken precedent recognized affected items as the hybrids – items with both partnership-item elements and nonpartnership-item elements.[22] "An 'affected item' is by definition [not] a "partnership item.' "[23]

These claims (both limitations and penalty interest) concern the provisions to classify, adjust, and adjudicate affected items. Specifically, the order in which their elements are determined and which courts have jurisdiction to adjudicate the partnership-item elements, the nonpartnership-item elements,

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[21] §6231(a)(3), (4), and (5), respectively. App:127-128. The term "item" is not defined.

[22] *Maxwell*, 87 T.C. at 783 and 790-91; *N.C.F. Energy Partners v. C.I.R.*, 89 T.C. 741, 745 (1987); *Roberts v. C.I.R.*, 94 T.C. 853, 860-61 (1990); *McGann v. U.S.*, 81 Fed.Cl. 642, 643 (2008); *Duffie v. U.S.*, 600 F.3d 362 (5th Cir. 2010), cert denied 131 S.Ct. 355 (2010).

[23] *Dial USA, Inc. v. C.I.R.*, 95 T.C. 1, 5 (1990); *Affiliated Eqmt Leasing II v. C.I.R.*, 97 T.C. 575, 578 (1991).

and the composite affected item itself.

TEFRA does not mandate that all partnership items be resolved only in a partnership-level proceeding.[24] It does, however, require that the merits of the partnership items be determined *before* affected items.[25]

Therefore, in any partnership-item proceeding (*e.g.*, a partnership-level suit or a partner-level settlement), all bound parties are required to obtain and preserve a merits determination of any partnership item, including partnership-item elements of affected items, they later seek to rely on.

For pre-1997 tax years no statute grants subject matter jurisdiction in partnership-level

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[24] For example, roughly half the petitioners settled their partnership items at the partner level on individual Forms 870-P(AD) under §6224(c)(1), which is an exception to §6221's general rule that "the tax treatment of any partnership item shall be determined at the partnership level."

[25] In certain circumstances partnership items, nonpartnership items and/or affected items can be determined contemporaneously. For example, in a §6224(c)(1) settlement on a Form 870-L(AD).

suits to determine any nonpartnership item (including affected items and any nonpartnership-item element of an affected item).[26] In any subsequent partner-level proceedings, the prior partnership-item merits determinations are conclusive as to any partner who was a party to that prior proceeding.[27] The merits of any partnership item that is not adjusted (*e.g.*, in a partnership-level suit or a partner-level settlement) is conclusive as filed on the partnership's original return.[28]

Once a binding partnership-item proceeding is concluded, then the IRS can assess tax attributable to any partnership-item adjustments but *only* if that partner's §6501(a) assessment period is still open – three years from the date the *partner* files his return, plus

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[26] *Maxwell*, 87 T.C. at 788; *N.C.F. Energy*, 89 T.C. at 745-47; *Dial USA*, 95 T.C. at 6; *Affiliated Eqmt.*, 97 T.C. at 579; *Petaluma FX Partners, LLC v. C.I.R.*, 591 F.3d 649 (D.C.Cir. 2010); *Jade Trading, LLC v. U.S.*, 598 F.3d 1372 (Fed.Cir. 2010).

[27] *Petaluma*, 591 F.3d at 655.

[28] *Roberts*, 94 T.C. at 862.

any binding extensions or exceptions.[29] The IRS can also assess any tax attributable to affected items,[30] but only after making any required partner-level merits determinations[31] and applying the applicable regulations.

After the partner pays the assessment, he can file a claim for refund asserting any partner-level nonpartnership-item or affected-item defenses.[32] If the IRS fails or refuses to pay, he can generally file suit in federal district court or the Court of Federal Claims.[33]

In a partner-level suit for refunds attributable to affected items, courts have jurisdiction to determine the merits of any nonpartnership items, including affected

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[29] *Curr-Spec Partners, L.P. v. C.I.R.*, 579 F.3d 391, 398-99 (2009), *cert* denied 130 S.Ct. 3321 (2010).

[30] Subject to the normal deficiency proceedings of subchapter B (§§6211-6216) and §6501.

[31] §6230(a)(2).

[32] *Olson v. U.S.*, 37 Fed.Cl. 727, 733-34 (1997), *aff'd* 172 F.3d 1311 (Fed.Cir. 1999).

[33] §7422(a); 28 U.S.C. §§1346(a)(1) and 1491(a).

items.[34] To determine an affected item, the court first *determines* the merits of the nonpartnership-item elements and then *applies* the prior merits determinations of any partnership-item elements binding on that partner – which are conclusive.[35] But §6221 bars the court from determining or re-determining the merits of the partnership-item elements.

Within this framework, litigation then proceeds to determine the specific affected item under the general federal rules.

As in any other litigation, if a party bears the burden to prove an issue and cannot meet that burden, he loses as to that issue. This means that if a party bears the burden to prove the merits of a partnership-item element of an affected item and either (i) he failed to obtain and preserve that determination in the proper forum (a partnership-item proceeding binding on that partner) or (ii) it was adversely conclusive on the original return, then that party loses as to that element.

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[34] *Maxwell*, 87 T.C. at 788.

[35] *Petaluma*, 591 F.3d at 655.

Because partnership items cannot be determined in partner-level refund suits, §7422(h) bars jurisdiction over any claim for a "refund attributable to partnership items (as defined in §6231(a)(3)) . . . ." App:131. By its plain terms, §7422(h) cannot bar claims where the refund is attributable to nonpartnership items, including affected items.

Similarly, §7422(h) does not bar jurisdiction merely because the *assessment* of the amount paid was attributable to partnership items.[36] For §7422(h) to bar jurisdiction over the *entire claim*, it is the *basis for* the refund, not the underlying assessment, that must be solely attributable to partnership items.[37]

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[36] *Prochorenko v. U.S.*, 243 F.3d 1359, 1363 (Fed.Cir. 2001); *Alexander v. U.S.*, 44 F.3d 328, 332-3 (5th Cir. 1995); *Field v. U.S.*, 328 F.3d 58, 59-60 (2nd Cir. 2003).

[37] *Field*, 328 F.3d at 59-60.

(2) *In Partner-Level Affected-Item Cases Courts Commonly Conflate §7422(h) (Jurisdiction Over Entire Claim) and §6221 (Jurisdiction to Determine Merits of Partnership Item Elements)*

As the Federal Circuit did in *Prati* III, courts commonly conflate §7422(h) (no jurisdiction over entire claim where refund is attributable to partnership items) with §6221 (no jurisdiction to determine the *merits* of a partnership-item element where the refund is attributable to an affected item) to render what this Court calls "drive-by jurisdictional rulings."[38]

Where a partner's refund is attributable to an affected item and he cannot meet his burden to prove a prior binding determination of a partnership-item element essential to his claim, this conflation harms only the precision and clarity of the law. Though incorrect, dismissing for "lack of jurisdiction" based on §7422(h) does not harm the partner; he would lose anyway because §6221 *does* deprive the court of jurisdiction to make a new partnership-item merits determination

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[38] *Steel*, 523 U.S. at 91.

essential to his claim.[39]

But both the law *and* the partner are harmed where, as here, a partner's refund is attributable to an affected item and either

(i) he *does not* bear the burden to prove the merits of any partnership-item element,[40]

(ii) his claim is based entirely on the merits of a nonpartnership item element, or

(iii) his claim is based on the misapplication to him of a partnership-item determination.

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[39] It does have jurisdiction to apply any prior partnership-item merits determination binding on that partner.

[40] Where, as here, a taxpayer proves the IRS assessed after the normal three-year deadline, the government bears the burden to prove any extension or exception it relies on. *Cary v. C.I.R.* 48 T.C. 754, 760 (1967); *Hoffman v. C.I.R.*, 119 T.C. 140, 146 (2002). There is no logic to assume, and no court has ever held, that these established burdens are switched simply because the amounts to be refunded are related to partnership investments.

Here, petitioners' refunds attributable to their assessment deadlines *always* have at least one nonpartnership-item element – the normal §6501(a) limitations period of three years from the date he filed his return. It may also have partnership-item elements – *e.g.*, a §6229-based limitations extension.[41] The burden to prove the merits of a partnership-item element may be on either the partner or the United States, depending on whether that partnership-item element is part of the partner's *prima facie* limitations claim or asserted as an affirmative defense thereto by the United States. The party bearing that burden can meet it by offering any prior partnership-item merits determination binding on that partner. If they cannot meet their burden then they lose as to that element. Just as in any other case.

What the courts cannot properly do, as was done here, is dismiss the partners' entire affected-item claim for lack of jurisdiction under §7422(h) where §6221 only deprived the court of jurisdiction to determine the merits of a partnership-item element. Here this

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[41] *AD Global Fund v. U.S.*, 481 F.3d 1351, 1354 (Fed.Cir. 2007).

conflation effectively and impermissibly switched the burden of proof: the *plaintiffs'* entire claims were dismissed for lack of jurisdiction because they could not establish jurisdiction to now prove the merits of a partnership-item element essential to the *United States'* affirmative defense.

(3) *Under TEFRA's Procedural Scheme Petitioners' Limitations Claims are Affected Items*

Under TEFRA's procedural scheme, a partner's limitations claim is properly classified as an affected item because it always has at least one nonpartnership-item element – the normal §6501(a) limitations period of three years from the date he filed his return – and it may also have partnership-item elements – *e.g.*, a §6229-based limitations extension. *Id.*

In *Prati* I the Court of Federal Claims recognized this but then conflated §7422(h) and §6221 to erroneously dismiss their entire limitations claims holding it lacked jurisdiction to determine the merits of a potential partnership-item element and, additionally, that the partners had waived their limitations claims by not raising them in the partnership-

level Tax Court suits. App:70-72, 81-84.

On appeal the Pratis and Deegans argued that §6226(d)(1)(B) jurisdictionally barred them from ever participating in the partnership-level suits and §6226(f) granted the Tax Court jurisdiction only over the partnership-item elements of an affected item. In *Prati* III the Federal Circuit simply ignored pre-1997 §6226(d)(1)(B)'s unambiguous jurisdictional bar. It circumvented the Tax Court's lack of subject matter jurisdiction over nonpartnership items by holding – for the first time ever – that when the partnership-item elements and nonpartnership-item elements of a partner's limitations period combine they create a partnership item – not an affected item.[42]

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[42] The only explanation offered by the Federal Circuit for excising limitations from TEFRA's standard procedures for affected items was the myth of uniform assessments - that the IRS must be allowed to assess against all partners or no partners but never only some partners. This is one of the most common and longstanding misapprehensions about TEFRA. Courts now correctly recognize that §6501(a), with any applicable exceptions, is the only statute of limitations for assessments attributable to partnership items and that it is specific to each

The Federal Circuit's misclassification of limitations as a partnership item cannot save its flawed analysis from pre-1997 §6226(d)(1)(B), which denies personal jurisdiction over any partner whose *assessment period has expired*, regardless of whether that period is classified as a partnership item or affected item.

(4) *Holding Pre-1997 §6226(d)(1)(B) Is Jurisdictional Supports TEFRA's Procedural Scheme for Pre-1997 Tax Years*

The deadline to assess liabilities attributable to partnership items against any particular partner is properly classified as an affected item. As such, it is subject to TEFRA's standard procedures for resolving affected items. The limitations claim itself can be decided only at the partner level, either in a pre-payment deficiency suit in the Tax Court, if available, or in a post-payment refund suit.

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individual partner. In other words, the fact that the IRS adjusts partnership items common to the partners does not mean that it will automatically be able to assess any resulting liability against all of them. It will be able to assess only against those whose limitations period has not expired. *Curr-Spec*, 579 F.3d at 398.

In refund suits, courts can *decide* the merits of any nonpartnership-item elements but only *apply* prior merits determinations of partnership-item elements that are binding on that partner.

Holding that §6226(d)(1)(B) is jurisdictional supports TEFRA's procedural scheme for affected items.

First, it makes clear that limitations is partner-specific, *i.e.*, that the myth of uniform assessments is a fallacy. Some partners are allowed to participate in the partnership-level suit while others are not, depending on whether their individual limitations periods have expired.

Second, it allows the parties to address (by *either* determining or applying) all elements of limitations in a single partner-level proceeding, including any elements that cannot occur until after any partnership-item proceeding is concluded. For example, §6229(d) and (f) extends the assessment period to one year after the partnership-item proceeding is concluded. Whether the IRS assesses within that period obviously cannot be determined until after the partnership-item proceeding is concluded.

Third, it conserves the resources of the courts, the IRS, and the individual partners by reducing the number of partners involved in a partnership-level proceeding to only those who still have an interest in its outcome thereby reducing the administrative burden on all involved.

Finally, other provisions of TEFRA and the Tax Court's own Rules support a finding that pre-1997 §6226(d)(1)(B) is jurisdictional:

- §6226(d)(2) bars partners with expired assessment periods from filing the petition for a partnership-level suit; App:124-125.
- §6228(a)(4)(B) bars partners with expired assessment periods from participating in partnership-level suits involving administrative adjustment requests;
- Tax Court Rule 241 requires petitioners in partnership-level suits to attest that they meet the §6226(d) interest requirement;
- Tax Court Rule 245 requires participating partners in partnership-level suits to attest that they meet the §6226(d) interest requirements; and

b. The 1997 Amendments Do Not Alter the Jurisdictional Nature of Pre-1997 §6226(d)(1)(B)

In 1997, Congress amended §6226(d) to allow partners with expired assessment deadlines to raise their partner-specific limitations defense in partnership-level suits. App:124. It also amended §6226(f) to marginally expand subject matter jurisdiction to issues not relevant here.[43] App:125.

Congress expressly made the §6226 amendments effective only for partnership tax years ending *after* the date of enactment (August 7, 1997).[44] This avoided an unfair change in the law to partners who had relied on the prior language in determining that they could not participate in either prior partnership-level suits or those then-pending.

The legislative history is clear that the

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[43] Taxpayer Relief Act of 1997, P.L.105-34 §§1238(b) and 1239(b).

[44] Compare Taxpayer Relief Act of 1997, P.L.105-34 §§1236(a), 1237(a), (b), and (c)(1), amending §§6227 and 6230 "as if included in the amendments made by §403 of P.L. 97-248," *i.e.*, generally effective as if originally enacted with TEFRA in 1982.

1997 amendment *clarified* that the Tax Court had injunctive and overpayment jurisdiction, but *permitted* (*i.e.*, granted/created) for the first time personal jurisdiction for a partner to participate in partnership-level suits to assert his individual assessment deadline had already expired.[45]

c. Certiorari Should be Granted and the *Henderson* Factors Applied to Pre-1997 §6226(d)(1)(B)

In fighting against summary affirmance, plaintiffs outlined the myriad constitutional and statutory conflicts created by *Prati* III's failure to address the existence, much less the jurisdictional consequences, of pre-1997 §6226(d)(1)(B).[Entries: 27 pp. 8-12; 29 pp. 5-6,10-14]. In *Eberhart* this Court explained the prudent course a court should then take. The Federal Circuit should have adhered to its understanding of precedent by applying this Court's general approach, as outlined in *Arbaugh*, to determine the jurisdictional

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[45] Taxpayer Relief Act of 1997, Pub. L. 105-34, §1239(b), 111 Stat. 788, 1027-28 (1997); S.Rep. 105-33, at 261-62 (1997); H.R.Rep. 105-148, at 594 (1997).

nature of pre-1997 §6226(d)(1)(B), and then plainly expressed its doubts; thus, facilitating this Court's review. It should *not* have imprudently "buried the issue by proceeding in a summary fashion" by burying the issue under 53 summary affirmances.[46]

All of the constitutional and most of the statutory conflicts created by *Prati* III are resolved by a proper application of the newly articulated *Henderson* factors to pre-1997 §6226(d)(1)(B).

Certiorari should be granted in these cases to clarify that *Henderson*, which concerned provisions for the Article I Veterans Court, also applies to provisions for the Article I Tax Court. After the jurisdictional consequences of pre-1997 §6226(d)(1)(B) are established under the *Henderson* factors, then the remaining issues can be addressed, including:

- the proper classification of a partner's §6501(a)-based limitations period as an affected item, and
- the proper application of established

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[46] *Eberhart v. U.S.*, 546 U.S. 12, 126 S.Ct. 403, 407, 163 L.Ed.2d 14 (2005).

§6501(a) precedent (*e.g.*, allocating burdens of proof) where the tax was attributable to a partnership item.

2. The Federal Circuit and Court of Federal Claims Conflated Merits and Jurisdiction to Impermissibly Render "Drive-By Jurisdictional Rulings" and "Hypothetical Judgments"

a. The Federal Circuit Improperly Affirmed Dismissals Based on "Hypothetical Judgments"

Petitioners also asserted – as an alternative for 1984 and 1985 and as the primary claim for 1986 – that the IRS improperly imposed penalty interest in contravention of §6621(c) and Treas.Reg §301.6621-2T. *Weiner* (Fifth Circuit) and *Prati* III (Federal Circuit) addressed similar §6621(c) claims. *Weiner* held §6621(c) was improper as a matter of law.[47] *Prati* III, affirmed dismissals for lack of jurisdiction under §7422(h). Petitioners' §6621(c) claims were erroneously dismissed based on *Prati* III, a "hypothetical" jurisdictional judgment that

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[47] *Weiner v. U.S.*, 389 F.3d 152, 163 (5th Cir. 2004), *cert. denied* 544 U.S. 1050 (2005).

conflated merits with jurisdiction.[48]

Former §6621(c) imposes interest at 120% of the standard rate on tax underpayments that exceed $1000 and are "attributable to" any tax motivated transaction ("TMT") listed in §6621(c) and Treas.Reg. §301.6621-2T. Congress enacted §6621(c) and other accuracy-related penalties (*e.g.* §6659) as *in terrorem* tools to encourage settlements and lighten the Tax Court's then-backlogged docket.[49]

Despite clear instructions to use §6621(c) to encourage settlement, Congress determined the IRS was punitively imposing §6621(c) and other penalties such as §6659. Only five years after enactment, it repealed §6621(c) and amended the other accuracy-related penalties, finding they were a "mind numbing," "morass

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[48] *Prati* III was also a hypothetical judgment as to petitioners' limitations claims.

[49] See *Todd v. C.I.R.*, 862 F.2d 540, 544 and n.14 (5th Cir.1988) and *Todd v. C.I.R.*, 89 T.C. 912, 916-18 (1987), *citing* H.R.Conf.Rep. No. 861, 98th Cong., 2d Sess. 984-5, (1984).

of inconsistency and irrationality,"[50] "determined too routinely and automatically by the IRS" in contravention of Congress' intent and discouraged rather than encouraged compliance.[51] Congress was appalled that "a hapless taxpayer can find himself, or herself, confronting the [I.R.C.] over a tax deficiency, where penalties and interest have been piled on to the extent that they are twice the amount of tax in dispute."[52]

Petitioners all settled with the IRS. Some on Forms 870-P(AD). Others, years later via agreed Tax Court decisions based on settlements between the TMPs and the IRS.[53] Petitioners assert neither settlement terms

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[50] Statement by Senator Pryor at 135 Cong. Rec. S13893-7 (October 24, 1989), 1989 WL 186980 (Cong.Rec.).

[51] H.R.Rep. No. 101-247, 1388, 1393-5, 1989 WL 168143, **2863, *1393; 135 Cong.Rec. S13057-03, 1989 WL 195142 *S13175; *Copeland v. C.I.R.*, 290 F.3d 326, 330 n.10 (5th Cir. 2002).

[52] Senator Pryor, *supra.*

[53] For tax years 1984 and 1985, petitioners were parties to the partnership-level suits only if their assessment period is held not to have expired.

(Forms 870-P(AD) or agreed decisions) support penalty interest.

Section 6621(c) was not repealed retroactively. The IRS still ruthlessly imposes it for tax years 1984-1989.[54] Hundreds of taxpayers still litigate the IRS's punitive misuse of §6621(c). And, as the *amicus curiae* SRK Wilshire Partners explained in *Curr-Spec*,[55] there are over 3,000,000 private companies formed as partnership entities.[56] Uncertainty in TEFRA's jurisdictional scheme directly affects every such partnership and partner.

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[54] *Weiner*, 389 F.3d at 162-3 ("[F]ifteen years after the statute's repeal, imposing the penalty in situations such as this does nothing to relieve the Tax Court's backlog, when the taxpayers have in fact settled with the IRS.").

[55] *Curr-Spec*, S.Ct.Docket No. 09-871.

[56] The IRS received 3,307,000 partnership returns for 2008. IRS Data Book Table 2, Number of Returns Filed, by Type of Return, Fiscal Years 2007 and 2008, http://irs.gov/pub/irs-soi/08db02nr.xls.

b. This Court Rejects "Hypothetical Jurisdiction"

In *Henderson*, the Court relied on *Arbaugh*, which relied on *Steel*, to differentiate between jurisdiction and claims processing rules. In those cases the Court recognized a tendency of courts to mischaracterize elements of a cause of action as a jurisdictional limitation.[57] A number of recent cases have sought to curtail these "drive-by jurisdictional rulings."[58]

The Court has long recognized the "absolute purity of the rule that Article III jurisdiction is always an antecedent question" because "[w]ithout jurisdiction the court cannot proceed at all in any cause." [59]

In *Steel* the Court recognized that in attempting to convert merits issues into jurisdictional issues, appellate courts sometimes erroneously employ an improper "doctrine of hypothetical jurisdiction," *i.e.*, they

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[57] See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S.—, 130 S.Ct. 1237, 1243-4, 176 L.Ed.2d 17 (2010).

[58] *Reed Elsevier*, 130 S.Ct. at 1243-44.

[59] *Steel*, 523 U.S. at 93-4 and 101, quoting *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868).

assume jurisdiction to decide the merits and then ultimately rule on jurisdiction based on the merits determination.[60] This is precisely what the Federal Circuit did in *Prati* III and more recently in *LeBlanc*.[61] *Steel* rejected that approach "because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."[62] This Court has emphatically rejected the premise that a court may decide the cause of action before resolving jurisdiction. *Id.*

As Justice Scalia explained in *Steel*, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Id.* at 101. As in *Steel*, "[m]uch more than legal niceties are at stake here. . . . The statutory and (especially) constitutional elements of jurisdiction are an essential

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[60] *Steel*, 523 U.S. at 93-4.

[61] *Leblanc v. U.S.*, 2011 WL 379305 (Fed.Cir. 2011) (unpublished). A petition for writ of certiorari will be filed on or before May 9, 2011.

[62] *Steel*, 523 U.S. at 94.

ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Id.*

The consequences warned against in *Steel* are apparent here. As these summary dismissals illustrate, *Prati* III's conflated "jurisdictional" holding that §7422(h) bars *all* affected item claims, coupled with §6226(f)'s limited grant of partnership-level jurisdiction, leaves partners with no forum to challenge §6621(c) or other affected item claims where the basis of their claim is a nonpartnership item or the misapplication of a prior partnership item merits determination. That outcome is contrary to TEFRA's intended jurisdictional scheme and violates partner's due process rights.

The lower courts are split as to the applicability and correctness of *Steel* – 51 cases have followed and 49 have "distinguished." In *Arbaugh*, this Court re-emphasized *Steel* and again rejected "drive-by jurisdictional" holdings that erroneously conflate federal-court "subject-matter" jurisdiction with

essential elements of federal claims for relief.[63]

In *Alliant* the Federal Circuit recognized jurisdiction is an antecedent issue and deciding important questions as to merits first essentially "reverses the proper sequence of determining jurisdiction before reaching the merits; in fact, it boils down to finding that the court has [or lacks] jurisdiction only after determining that the claimant should win [or lose]."[64] Nonetheless, in *Prati* III the Federal Circuit assumed hypothetical jurisdiction, made an erroneous determination on the United States' defense to the merits of the claim (based on 3 paragraphs of analysis and inadequately and incompletely developed relevant facts), and then dismissed for lack of jurisdiction based on that merits holding. In these 53 cases, there was no factual development at all.

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[63] *Arbaugh*, 546 U.S. at 503-04, citing 2 J. Moore et al., Moore's Federal Practice § 12.30[1], p. 12-36.1 (3d ed.2005).

[64] *Alliant Techsystems, Inc. v. U.S.*, 178 F.3d 1260, 1265 (Fed.Cir. 1999).

c. Section 7422(h) Cannot Bar §6621(c) Claims

The antecedent jurisdictional issue here turns on §7422(h): "[n]o action may be brought for a refund attributable to partnership items (as defined in §6231(a)(3)) . . . ." App:130.

Since 1987 the Tax Court has consistently held it lacks jurisdiction to determine §6621(c) in *partnership*-level suits because

(i) §6621(c) is an affected item (as defined in §6231(a)(5)) and not a partnership item (as defined in §6231(a)(3)), and

(ii) affected items are not within §6226(f) jurisdiction in partnership-level suits.[65]

The Second and Fourth Circuits hold §6621(c) penalty interest is not a partnership item.[66] In *Field,* the Second Circuit expressly held partner-level §6621(c) claims are not barred by §7422(h). The Second Circuit (i)

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[65] *N.C.F. Energy*, 89 T.C. at 744-5. See also *Affiliated Equip.*, 97 T.C. at 576-78, citing *White v. C.I.R.*, 95 T.C. 209, 212 (1990).

[66] *Field*, 328 F.3d at 60; *Zfass v. C.I.R.*, 118 F.3d 184, 192 (4th Cir. 1997).

relied on extensive precedent holding §6621(c) is an affected item, (ii) accepted the government's concession that §6621(c) is an affected item, and (iii) reasoned that §7422(h)'s parenthetical reference to §6231(a)(3) meant jurisdiction is barred only if the item sought to be refunded is a partnership item, not that the amount to be refunded was attributable to partnership items. That court refused to expand §7422(h) to encompass claims for refund that are indirectly, tangentially, or capable of being attributable to partnership items.

In *Prochorenko*, the Federal Circuit followed *Monti*, another Second Circuit decision, in construing whether §7422(h) barred claims for §6224(c) consistent settlement. Both Circuits held the refunds were not barred because the claims were "attributable to" §6224(c) consistent settlements, an affected item not a partnership item.[67] The Federal Circuit adopted the Second Circuit's observation that "at some level of generality, most refund claims for partnership taxes can be characterized as a refund

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[67] *Prochorenko*, 243 F.3d at 1363, *citing Monti v. U.S.*, 223 F.3d 76, 82 (2nd Cir. 2000).

'attributable to partnership items,' " but held that construing that phrase so broadly would be contrary to the system of TEFRA's separate treatment of partnership items and nonpartnership items.

Application of Treas.Reg. §301.6621-2T, A-5 sets out how §6621(c) is determined and proves it is an affected item not a partnership item. Under that regulation, §6621(c) cannot be determined until

(i) partnership-level, partnership-item adjustments are final,

(ii) partner-level, nonpartnership items adjustments have been determined,

(iii) the resulting changes to the partner's personal return have been made to reflect the partnership item and non-partnership item adjustments,

(iv) the partner's individual tax liability has been calculated and, finally,

(v) the liability is allocated to the grounds for adjustment to make the necessary "attributable to" determination (see discussion below).

The last four of those steps can only be

made at the partner level.

In *Prati* III, the Federal Circuit failed to conduct any antecedent jurisdictional analysis at all. Instead, it exercised "hypothetical jurisdiction" to address the merits of the United States' defense to petitioners' §6621(c) claims and then doubled-back to hold it lacked jurisdiction based on its short-shifted merits determination.

Here, if petitioners are allowed to develop their facts, they can and will proffer evidence that the IRS and TMP never intended the agreed decisions to concede any TMT and that those agreed decisions actually allowed some of the deductions disallowed in the Form 870-P(AD) settlements.

d. The Court of Federal Claims and Federal Circuit Conflated Merits and Jurisdiction

The Court of Federal Claims recently rejected an assertion that it lacked jurisdiction over a claim that the Department of Energy violated 48 C.F.R. §19.502-2(b), which governs small business set asides. The Court of Federal Claims found the government conflated the merits of whether the regulation *was violated*

with the jurisdictional question of whether the court *may consider* whether the regulation was violated.[68]

The Pratis asserted Treas.Reg. §301.6621-2T, A-5 was violated. The Government's defense asserted it was not. The Court of Federal Claims and Federal Circuit both mistakenly conflated the merits of whether the regulation was violated (merits) with whether it could consider whether the regulation was violated (jurisdiction).

Treas.Reg. §301.6621-2T, A-5 mandates the following formula to determine if a tax liability is attributable to a TMT:

> (1) Calculate the tax liability using all proper adjustments ("total tax liability").
>
> (2) *Without taking into account adjustments attributable to TMTs*, calculate the tax liability using the only the non-TMTs adjustments ("tax liability without regard to tax motivated transactions").

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[68] *FFTF Restoration Co., LLC v. U.S.*, 86 Fed.Cl. 226, 243-4 (2009).

(3) The difference between (1) and (2) is the amount of tax motivated underpayment.

In *Todd*, the Fifth Circuit and Tax Court recognized both §6621(c) and §6659 turn on an "attributable to" determination and legislative history for §6659 prescribes an almost identical formula for making that determination. Analysis and precedent for §6621(c) and §6659 has been used interchangeably.[69]

In *Todd*, the Fifth Circuit adopted Congress' preface to the §6659 formula: "*[t]he portion of a tax underpayment that is attributable to a valuation overstatement will be determined after taking into account any other proper adjustments to tax liability.*"[70] Similarly, under step (2) of Treas.Reg. §301.6621-2T, A-5, all *non-TMT* grounds for adjustment are taken into account first. The consequence of allocating all nonTMT grounds

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[69] *Heasley v. C.I.R.*, 902 F.2d 380, 383 n.5 (5th Cir. 1990); *McCrary v. C.I.R.*, 92 T.C. 827, 857-860 (1989); *Sinclair v. C.I.R.*, 58 T.C.M. (CCH) 1140, 1142 (1990).

[70] *Todd*, 862 F.2d at 542 (emphasis in original).

for adjustment first is that §6621(c) only applies to tax liability that is *solely* attributable to a TMT.

The Second, Fifth, Ninth, Tenth Circuits, and the Tax Court all determine "attributable to" using the formula in that manner and have arrived at the same "solely attributable to" conclusion.[71] They have also further held it is improper to cherry-pick TMTs from among multiple, alternative adjustment grounds and ignore the non-TMT grounds for adjustment. Stated another way, if the IRS shotguns the grounds for adjustment and some grounds are TMTs and some not, then no portion of the underpayment is "attributable to" a TMT or subject to §6621(c).[72]

The Court of Federal Claims and several

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[71] *Irom v. C.I.R.*, 866 F.2d 545, 547-8 (2nd Cir. 1989); *Weiner*, 389 F.3d at n.10; *Gainer v. C.I.R.*, 893 F.2d 225, 228 (9th Cir. 1990); *Borgardus v. U.S.*, 956 F.2d 277 (10th Cir. 1992) (unpublished), *citing Todd* and *Gainer* and *affm'g Borgardus v. U.S.*, 1990 WL 259675 (W.D. Ok.1990); *see also McCrary*, *supra.*; and *Todd*, 89 T.C. at 916-18.

[72] See *Weiner*, 389 F.3d at 152-3 and authorities cited therein.

district courts have recognized the regulation is applied in this manner. [73] The IRS's official internal policy recognizes that if an item is disallowed for TMT *and* non-TMT reasons, the underpayment is not attributable to any TMT ground and §6621(c) should not be imposed.[74]

The government's defense challenged the "solely attributable to a TMT" application of the regulation. It asserted that if even one of several alternative grounds originally asserted by the IRS but not addressed in the Form 870-P(AD) settlements was a TMT, that was sufficient to impose §6621(c). In *Prati* III the Federal Circuit followed the United States' lead, improperly cherry-picked one TMT ground from among 14-23 multiple, alternative, independent grounds for adjustment (most of which were not TMTs), and then dismissed the claim for lack of jurisdiction, asserting the partnership level

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[73] *McGann, supra*; *Bartimmo v. U.S.*, 2007 WL 4246113 (S.D.Tex. 2007); *Mellina v. U.S.*, 518 F.Supp.2d 825 (N.D.Tex. 2007). August 7, 1989 LGM, *supra*.

[74] IRS Litigation Guideline Memoranda, 1992 WL 1355877 (August 12, 1992); IRS Litigation Guideline Memoranda, 1989 WL 989830 (August 7, 1989).

TMT determination was determinative of the §6621(c) claim.

Recent decisions by the D.C. and Federal Circuits illustrate the court's error in *Prati* III and make clear the due process issues.[75] In the partnership-level proceedings in *Petaluma* and *Jade Trading*, the government asserted the court could summarily decide affected item issues based on its partnership item determinations. But the D.C. and Federal Circuits held affected items can only be determined at the partner-level and "[t]he fact that a determination seems obvious or easy does not expand the court's jurisdiction beyond what the statute provides. In other words, it does not matter how low the fruit hangs when one is forbidden to pick it."[76]

The D.C. and Federal Circuits held affected-item claims must be heard at the *partner* level even if a partnership-level partnership-item merits determination controls the outcome of the affected-item claim. But in *Prati* III the Federal Circuit held an

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[75] *Petaluma, supra*; *Jade Trading, supra.*

[76] *Petaluma*, 591 F.3d at 655.

alleged partnership item determination at the partnership level jurisdictionally barred subsequent §6621(c) affected item claims.

Petaluma and *Jade Trading* are better reasoned opinions and are supported by statute. The *Prati* III drive-by, hypothetical jurisdictional holding is not supported by statute or precedent and leaves taxpayers with no forum to contest affected item assessments.

Henderson now builds on *Arbaugh* which built on *Steel*, where this Court rejected the exercise of "hypothetical jurisdiction" and warned against conflating merits with jurisdiction.

CONCLUSION

Certiorari should be granted and all 53 judgments vacated to:

(i) determine the jurisdictional consequences of pre-1997 §6226(d)(1)(B) after applying the newly articulated *Henderson* factors, and

(ii) apply this Court's intervening holdings in *Henderson*, as well as existing precedent in *Arbaugh* and *Steel*, to reverse the lower courts' "drive-by

jurisdictional rulings" and "hypothetical judgements" that conflate jurisdiction with merits.

After the Court of Federal Claims' jurisdiction is established these cases should be remanded to determine the merits of petitioners' claims with instructions:

(i) as to limitations,

(a) to determine when each partner's three-year §6501(a) assessment period expired, and

(b) to apply any prior binding determinations of any partnership-item exceptions or extensions of that three-year period that

(1) are raised by the United States as an affirmative defense, and

(2) were obtained and preserved by the government as a prior partnership-item determination binding on that partner; and

(ii) as to penalty interest, to determine, after submission of evidence, if there was a binding prior partnership-item merits determination (Form 870-P(AD) settlements or the Tax Court agreed decisions, as applicable) establishing the liabilities were "attributable to" TMT's under Treas. Reg. §301.6621-2T, A-5.

Respectfully submitted.

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MARCH 2011

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App. 1

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5117

RONALD C. PRATI and MARY G. PRATI,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

- -

2008-5129

EDWARD J. DEEGAN and JOAN S. DEEGAN,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Thomas E. Redding, Redding & Associates, P.C., of Houston, Texas, argued for all plaintiffs-appellants. With him on the brief were Sallie W. Gladney and Teresa J. Womack.

Deborah K. Snyder, Attorney, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were John A. DiCicco, Acting Assistant Attorney General, and Michael J. Haungs, Attorney.

Appealed from: United States Court of Federal Claims

Judge Lawrence J. Block

App. 2

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5117

RONALD C. PRATI and MARY G. PRATI,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the
United States Court of Federal Claims
in 02-CV-060, Judge Lawrence J. Block.

2008-5129

EDWARD J. DEEGAN and JOAN S. DEEGAN,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the
United States Court of Federal Claims
in 06-CV-594, Judge Lawrence J. Block.

DECIDED: May 5, 2010

Before RADER, BRYSON, and MOORE, Circuit Judges.

BRYSON, Circuit Judge.

These two federal tax cases raise complex questions pertaining to the taxation of transactions involving partnerships. Our analysis is relatively straightforward, however, because prior decisions of this court in related cases have dealt with and resolved several of the issues that are before us in these cases. Those decisions largely dictate the results we reach here.

I

The dispute in these cases relates to a number of limited partnerships managed by American Agri-Corp ("AMCOR"), a corporation that promoted tax shelter partnerships during the 1980s. The partnerships were designed to generate a large loss in the first year, allowing each partner to claim a tax deduction averaging twice the size of his investment, with the excess loss to be recaptured in subsequent years. Appellant Ronald Prati and his wife invested in three of the AMCOR partnerships, while appellant Edward Deegan and his wife invested in another AMCOR partnership. In 1985, the partnerships filed tax returns claiming an ordinary loss deduction; the Pratis and the Deegans used those losses on their individual tax returns to offset their taxable income for that year.

The Internal Revenue Service began investigating the AMCOR partnerships in 1987. It subsequently issued Notices of Final Partnership Administrative Adjustment ("FPAAs") to 43 partnerships in 1990 and 1991 with respect to their 1985 returns. The FPAAs disallowed the deductions for several reasons, including that the partnership activities constituted a series of "sham transactions."

Representatives of the partnerships challenged the FPAA disallowances in partnership-level proceedings before the Tax Court pursuant to 26 U.S.C. ("I.RC.") §6226(b). Among the issues litigated was whether the adjustments were barred by the statute of limitations. The parties selected a number of test cases, and each partnership signed a "Stipulation to be Bound" in which it agreed that "the outcome of the statute of limitations issue present in this Partnership Case will be determined in a manner consistent with the [Tax] Court's findings of fact and law on the statute of limitations issue present in the Test Case Group case of Agri-Venture Fund." In 2000, the Tax Court rejected the statute of limitations defense in the test cases, finding that one of the partnerships had failed to file a valid partnership return and that the other four had validly agreed through their tax matters partners ("TMPs") to extend the time period pursuant to I.RC. §6229(b). See Agri-Cal Venture Assocs. v. Comm'r, 80 T.C.M. (CCH) 295 (2000).

While those partnership-level suits were pending, some partners (including the Pratis) chose to settle their partnership items. The IRS accepted those settlements in April 1997 and assessed the applicable taxes and interest. As part of the assessment, the IRS sought additional interest pursuant to former I.RC. §6621(c), a special interest provision for "substantial underpayments attributable to tax motivated transactions." That statute defined "tax motivated transactions" to include "any sham or fraudulent transaction." I.RC. §6621(c)(3)(A)(v) (repealed 1989). After paying the assessments in full, the Pratis filed partner-level administrative refund claims with the IRS in April 1999. The IRS disallowed those refund claims as precluded by I.RC. §7422(h), which provides that "[n]o action may be brought for a refund attributable to partnership items." In 2002, the Pratis filed a refund action in the Court of Federal Claims.

Meanwhile, in 2001, the IRS moved under Tax Court Rule 248(b) for entry of decision in the remaining partnership cases. The IRS's motion represented that the IRS and the TMPs for the AMCOR partnerships had reached contingent agreements with respect to all the disputed partnership items, and that all partners meeting the interest requirements of LRC. §6226(d) would be deemed parties bound by the entered decisions. In accordance with that motion, the Tax Court entered stipulated decisions on July 19,2001. The

IRS then assessed taxes and section 6621(c) interest against those partners who had not settled with the IRS (including the Deegans). The Deegans paid the assessments in full and then filed administrative refund claims with the IRS in 2004. The IRS disallowed the claims, and the Deegans filed suit in the Court of Federal Claims in 2006.

A total of 129 AMCOR-partnership tax refund cases were filed by various taxpayers in the Court of Federal Claims. Of those, the taxpayers identified 77 as being factually and legally similar. The parties selected the Prati case to serve as a representative case, and the trial court stayed the remaining 76 of the 77 similar cases pending its decision in that case.

In Prati, the taxpayers raised two primary claims for relief: first, that the assessments were untimely because they were made after the statute of limitations had expired; and second, that the assessments of section 6621(c) interest were improper because the partnership transactions at issue were not tax-motivated transactions. The government responded that in light of the prohibition in section 7422(h) against bringing a refund action for a refund "attributable to partnership items," the trial court lacked jurisdiction to hear either claim because both claims were partnership items that should have been challenged in the partnership-level proceeding instead of in partner-level proceedings.

In April 2008, the trial court dismissed the Pratis' claims for lack of subject matter jurisdiction pursuant to section 7422(h). The court also ordered the dismissal of the 76 cases that the parties had identified as presenting identical claims, including the Deegan case. The court relied heavily on the reasoning in Keener v. United States, 76 Fed. Cl. 4455 (2007), which had already considered the same claims in the context of section 7422(h) and which was on appeal to this court at that time.

Following the trial court's decision in Prati, the taxpayers filed a motion for reconsideration requesting, inter alia, that the judgments be vacated in all 77 related cases. They asserted that the cases should either be stayed pending this court's decision in Keener, which the taxpayers stated would be "binding" on all 77 cases, or be consolidated so that the cases could proceed as a single appeal. They argued that doing so would avoid unnecessary appeals and preserve the resources of the parties and the court. The trial court denied the motion.[1]

The taxpayers filed appeals in 57 cases and then moved to stay those appeals pending this

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[1] The trial court vacated the judgments in 17 cases in which the parties stated that additional case-specific claims were presented, but only "for the limited purpose of allowing plaintiffs to pursue any unresolved, case-specific claims that may still be outstanding."

court's decision in Keener.[2] In support of that motion, the taxpayers again expressed their belief that "this Court's holdings in Keener should resolve the jurisdictional issues on appeal in all 58 cases." The motions to stay were granted.

On January 8, 2009, this court issued its opinion in Keener affirming the dismissal of the plaintiffs' claims for lack of jurisdiction. Keener v. United States, 551 F.3d 1358 (Fed. Cir. 2009). The government then moved for summary affirmance in all the related cases. This court denied the government's motions without prejudice, so as to permit the taxpayers to present argument as to why Keener should not control the disposition of the remaining cases. We lifted the stays in Prati and Deegan to permit them to proceed as representative of cases involving settling partners and non-settling partners, respectively.

II

At the outset, the government argues that these appeals are barred by judicial estoppel (as to both the Pratis and the Deegans) and waiver (as to the Deegans). The government's argument is based on the way the parties litigated the large number of related AMCOR-partnership tax refund cases.

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[2] Two of those appeals were subsequently dismissed for lack of appellate jurisdiction on an unopposed motion by the government.

The taxpayers represented that Keener, Prati, and all the other AMCOR-partnership tax refund cases now on appeal before this court were indistinguishable with respect to the jurisdictional issues presented in those cases, and that this court's decision in Keener would resolve those issues conclusively. The government contends that the taxpayers should not be allowed to alter their position now that Keener has been decided and has rejected the arguments made by the taxpayers in that case.

We see no basis for judicial estoppel here. The Pratis and the Deegans reasonably expected that the Keener case would resolve the jurisdictional issues raised in these appeals. A representation that a pending case should be dispositive, however, does not deprive parties of the right to argue that the ensuing decision failed to settle all the issues to be resolved in their case. To apply judicial estoppel in cases such as these would raise the specter of forfeiture of appellate rights whenever a party requests a stay to allow a "representative" case to go forward separately for the purpose of resolving issues common to all of the related cases. See Whiting v. Krassner, 391 F.3d 540, 543-44 (3d Cir. 2004) (party's request for a stay based on the likelihood that his claim would be held to be moot "is not the type of 'position' that should work an estoppel," where the position was not asserted in bad faith and was "more predictive than assertive"); Bendet v. Sandoz Pharms. Corp., 308

F.3d 907, 910 (8th Cir. 2002) (party that sought a stay based on an assertion that its evidence was "essentially the same" as the evidence in another case, was not judicially estopped from seeking to distinguish the other case after an adverse decision in that case).

The government also argues that the Deegans waived their right to argue that their case is distinguishable from the Pratis' case because the Deegans did not raise any such distinction before the Court of Federal Claims. In particular, the government contends that the Deegans did not argue that their case differs from the Pratis' case in that the Pratis entered a settlement while the Deegans did not. It is true that the non-settling partners did not argue before the Court of Federal Claims that their legal status was different from that of the settling partners. Instead, the taxpayers in all of the related cases proceeded on the assumption that their claims would be resolved by legal rulings that would apply equally to the settling and non-settling partners.

This court's decision in Keener rejected the principal arguments raised by the taxpayers in all of the related cases. In the Deegans' view, however, this court's opinion in Keener was narrower than the trial court's opinion in that case and thereby gave rise to a potential ground for distinguishing their claims from those of the settling partners. Under those circumstances, and in light of this

court's direction that briefing and argument proceed in both the Prati and Deegan cases so as to address any issues raised by the different legal status of the settling and the non-settling partners, we do not find that the failure to draw that distinction in the trial court resulted in a waiver of appellate rights.

III

Turning to the merits, the appellants argue that this court's decision in Keener did not resolve the statute of limitations claim and the section 6621(c) interest issue as applied to these cases. In particular, they argue that section 7422(h) does not bar them from litigating those two issues in the refund proceedings in the Court of Federal Claims. We disagree.

Congress enacted the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, §402(a), 96 Stat. 648, in order to promote consistent tax treatment of partners and to avoid duplicative litigation. Under TEFRA, the tax treatment of "partnership items" is determined in a single partnership-level proceeding. Section 7422(h) of the Code enforces that principle by prohibiting partners from bringing individual actions "for a refund attributable to partnership items . . . ." A partnership item is defined as

> any item required to be taken into account for the partnership's taxable year under any

> provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

I.R.C. §6231(a)(3).

In Keener, the court found that the taxpayers' statute of limitations claim was "attributable to a partnership item" and therefore was barred by section 7422(h) from being litigated in a refund action. The Keener court rejected the taxpayers' argument that "the provisions relevant to this claim—namely, §§6229(a) and 6501—are found in subtitle F of the code, rather than subtitle A, [and so] the claim cannot be considered a partnership item by definition." 551 F.3d at 1363. Because the court concluded that the statutory definition of "partnership item" was ambiguous, it looked to the definition of "partnership item" in the Treasury regulations. That definition provides that partnership items include "the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc." Treas. Reg. §301.6231(a)(3)-1(b). The Keener court found that definition to be a permissible interpretation of the statutory language and thus entitled to deference under Chevron U.S.A Inc. v. Natural Resources Defense Council. Inc., 467 U.S. 837

(1984). Applying that definition to the case before it, the Keener court concluded that the definition was broad enough to encompass the taxpayers' statute of limitations claims. That result, the court noted, was consistent with "TEFRA's dual goals of centralizing the treatment of partnership items and ensuring the equal treatment of partners." 551 F.3d at 1363-64 & n.3.

The Keener court also rejected the taxpayers' argument that section 6621(c) interest should not have been assessed against them because the transactions for which that interest was imposed were not "tax motivated transactions," as required by section 6621(c). The court observed that determining whether a particular partnership transaction is tax motivated, and specifically whether it is a "sham" transaction, turns on "the nature of the partnership's transaction," which is a partnership item. 551 F.3d at 1366. Accordingly, the court concluded that the taxpayers' challenges were "attributable to partnership items," and thus that section 7422(h) barred those challenges from being litigated in a refund action.

The Keener court also dismissed the taxpayers' contention that, by issuing FPAAs that listed multiple, independent grounds for disallowance—some that qualified as tax motivated and some that did not—the IRS failed to make any conclusive determination as to whether the partnerships' transactions were tax motivated.

The court observed that, even assuming the taxpayers could raise their section 6621(c) claims in the refund proceeding, their argument would be unpersuasive because the IRS's inclusion of additional grounds for disallowance of their deductions did not somehow undermine its determination that the transactions at issue were tax motivated. Keener, 551 F.3d at 1367 (it would be inequitable "to impose penalty interest when a deduction is disallowed because the partnerships' transactions were tax motivated, but not to impose penalty interest when that deduction is also disallowed on other inseparable grounds").

A

The appellants argue that the decision in Keener does not resolve their statute of limitations claim because they raised two independent limitations claims, under I.R.C. §6229 and I.R.C. §6501 respectively, and Keener dealt only with the section 6229 claim. For that reason, they assert, Keener did not bar the defense predicated on section 6501. Section 6501, the general statute of limitations for tax assessments against individuals, gives the IRS three years to issue an assessment from the date the taxpayer's return is filed. For partnership items, section 6229 extends that period to three years after the later of (1) the date on which the partnership return is filed, or (2) the last day for filing the partnership return for a taxable year.

The appellants base their argument on this court's recent decision in AD Global Fund, LLC v. United States, 481 F.3d 1351 (Fed. Cir. 2007), which held that section 6229 "does not create an independent statute of limitations." Id. at 1354 & n.2. According to the appellants, the significance of that holding is that section 6501 is the only applicable statute of limitations, so that a court presented with a statute of limitations defense may look only to the three-year period provided by section 6501. The section 6229 time extension is not invoked, they argue, unless it is separately asserted by the government.

We disagree with the appellants' argument. Sections 6501 and 6229 operate in tandem to provide a single limitations period. When an assessment of tax involves a partnership item or an affected item, section 6229 can extend the time period that the IRS otherwise has available under section 6501 to make that assessment. See Andantech L.L.C. v. Comm'r, 331 F.3d 972, 976-77 (D.C. Cir. 2003); Grapevine Imports, Ltd. v. United States, 71 Fed. Cl. 324, 328-39 (2006). Thus, the limitations period is the period defined by section 6501, as extended when appropriate by section 6229. Sections 6501 and 6229 do not operate independently to allow a taxpayer to assert one in isolation and thereby render an otherwise timely assessment untimely.

In Keener, the court's reasoning was directed to the statute of limitations defense as a general matter and was not limited, as the appellants contend, to section 6229. Although the Keener court referred to section 6229 and did not mention section 6501, it is clear, given the interaction between sections 6501 and 6229, that the court's reference to section 6229 was merely a shorthand way of referring to the taxpayers' overall statute of limitations claim. Thus, the Pratis and Deegans cannot distinguish their cases from Keener on the ground that Keener did not discuss section 6501.[3]

Based on Keener, we hold that the statute of limitations issue is a partnership item and that the Pratis and the Deegans were required to raise the limitations issue in the partnership-level proceeding prior to either entering settlement or stipulating to judgment in the Tax Court.[4] They

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[3] Nor is there any merit to the Pratis' argument that their settlement agreements with the IRS were comprehensive and "had no provisions extending the §6501 assessment period," because, as explained above, section 6229 does not operate independently from section 6501.

[4] The appellants argue that they could not participate in the partnership-level proceeding because that action was instituted after the statute of limitations had expired as to each of them, and also because individual partners were barred from raising statute of limitations claims in partnership-level proceedings until such a procedure was expressly permitted by a 1997 amendment to the Code. See

did not do so, and we therefore affirm the trial court's ruling that section 7422(h) bars them from raising their statute of limitations claims in the refund proceedings.

B

The appellants next contend that Keener did not address or resolve the particular grounds on which they now challenge the penalty interest imposed against them under former section 6621(c).

One of the significant omissions in Keener, according to the appellants, was the court's failure to address Treasury Regulation §301.6621-2T, A-5.

Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §1239(f), 111 Stat. 788, 1028. We reject both arguments. As for the appellants' argument that they were barred from participating in a proceeding to decide whether the statute of limitations had run because the statute of limitations had already run, that argument is circular and has no merit. As for their latter contention, the 1997 amendment merely codified prior practice in the Tax Court; the appellants, as individual partners, were therefore free to participate in the partnership-level proceedings to litigate the statute of limitations issue. See Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r, 114 T.C. 533, 535 (2000) ("[W]e have held that a partner may participate in such action for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired and that we have jurisdiction to decide whether that assertion is correct."); Columbia Bldg., Ltd. v. Comm'r, 98 T.C. 607 (1992).

That regulation explains how to determine the amount of an underpayment that is tax motivated, which is the amount subject to penalty interest. The calculation is performed by starting with the total tax liability. taking into account all adjustments, and subtracting the amount of tax liability "[w]ithout taking into account any adjustments . . . that are attributable to tax motivated transactions." That difference yields the amount of the "tax motivated underpayment," an amount that includes any adjustments that are "attributable" to tax-motivated transactions.

The appellants contend that the Treasury regulation, as properly applied, permits section 6621(c) interest only with respect to underpayments that are "solely attributable" to a tax-motivated transaction. The Pratis, who entered into a settlement with the IRS resolving their partnership items, state that the settlement they entered did not identify the grounds for disallowance, so the settlement must be deemed to have incorporated all of the grounds listed in the FPAA. Because the finding of sham was only one of many reasons for disallowance, they argue, the underpayments were not "solely attributable" to tax-motivated transactions. Accordingly, they conclude, section 6621(c) interest should not have been imposed on them.

The problem with the appellants' argument is that the court in Keener held that a dispute over

the "characterization of a partnership's transaction is a partnership item." 551 F.3d at 1365. The appellants seek to distinguish their claim by characterizing it not as a "direct challenge to sham" but instead as a "merits based defense as to why Treasury Regulation §301.6621-2T, A-5 was allegedly not violated." But that contention is disingenuous because the appellants' regulation-based argument, if accepted, would invalidate the determination that the partnerships' transactions were tax motivated. That determination, which flowed directly from the finding of sham, is equally tied to the nature of a partnership's transaction. Because the appellants' challenge to the penalty interest assessments is inherently a dispute over the proper characterization of the partnerships' transactions, that issue is barred by section 7422(h) from being litigated in the refund action before the Court of Federal Claims.

The Pratis also maintain that the settlements they entered were comprehensive and that those settlements did not include any determinations as to the nature or characterization of the partnerships' transactions. To the extent they are disputing the finding that those transactions were tax motivated, that line of argument remains barred by section 7422(h). To the extent they are suggesting that the settlement had the effect of converting all partnership items into non-partnership items and that they are thus

entitled to challenge the penalty interest assessments in individual refund actions, that argument runs afoul of another one of this court's recent AMCOR-partnership decisions, Schell v. United States, 589 F.3d 1378 (Fed. Cir. 2009). In that case, which involved similar settlement agreements, we held that, notwithstanding the settlements, "the sham-transaction issue was not converted into a non-partnership item, and the Taxpayers' refund claims necessarily involve resolution of 'partnership items.'" Id. at 1383-84.

The Deegans, whose claims were resolved by a stipulated decision in the Tax Court, argue separately that the stipulated decision attributed the disallowance of their deduction to a "lack of economic substance" in the underlying transaction, which the Deegans argue is different from a "sham transaction." Again, however, that argument is directed to the nature of the partnership transaction and therefore is barred by section 7422(h) from being raised before the Court of Federal Claims. Moreover, the Deegans' argument that the Court of Federal Claims mischaracterized the Tax Court's decision, and that the penalty issue remains open for decision in the refund action, is rebutted by the text of the stipulated decision itself. The Tax Court's decision clearly equated lack of economic substance with "sham transaction" by specifically citing I.R.C. § 6621(c)(3)(A)(v), the provision that defines

tax-motivated transactions as including "any sham or fraudulent transaction."

For the foregoing reasons, we sustain the decision of the Court of Federal Claims dismissing the appellants' claims in both cases.

AFFIRMED.

In the
United States Court of Federal Claims
No. 02-60 T
July 31, 2008

RONALD C.
& MARY G. PRATI

Plaintiffs,

RCFC 42,59; Motion for Reconsideration; Motion to Vacate Judgment; Consolidation

v.

THE UNITED STATES
OF AMERICA,
Defendant.

Thomas E. Redding and *Teresa J. Womack*, Redding & Associates P.C., Houston, Texas, for plaintiffs.

Bart D. Jeffries, United States Department of Justice, Tax Division, Washington, D.C., with whom was Assistant Attorney General *Eileen J. O'Connor*, for defendant.

AMENDED ORDER AND OPINION

I. INTRODUCTION

Plaintiffs move under Rule 59 of the Rules of the United States Court of Federal Claims ("RCFC"), for reconsideration of this Court's April

16, 2008 opinion in *Prati v. United States*, 81 Fed. Cl. 422 (2008), dismissing the claims of plaintiffs Ronald C. and Mary G. Prati and 76 other similar AMCOR cases for lack of subject matter jurisdiction. Pls.'s Mot. for Reconsideration, April 30, 2008 [Docket #89]. At the May 2, 2007 oral argument on the defendant's motion to dismiss and the parties' cross-motions for summary judgment, the parties requested that the Court first resolve the jurisdictional issues arising in the AMCOR tax partnership cases and that for such a purpose *Prati* should serve as a representative case. Tr. of Oral Argument, *Isler v. United States*, No. 01-344, May 2, 2007, at 173-79 [Docket #122]. According to the parties in their jointly-proffered chart identifying which AMCOR cases had what issues, there appeared to be 76 other AMCOR cases that shared similar jurisdictional issues as *Prati*. For efficiency sake, these cases were treated together—although never formally consolidated or combined—for the limited purpose of addressing the common legal issues in the pending motions. Supplemental Joint Chart, *Isler v. United States*, No. 01-344 [Docket #127]. Accordingly, the *Prati* decision applies to 77 of the 124 AMCOR cases pending before this judge[1] and, therefore, the

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[1] The 76 other cases covered by the *Prati* opinion are: Acker, Nadine (07-215); Adams, Samuel (07-162); Arumugam, Velusami (02-1395); Aylward, Thomas (06-593); Baer, Maurice (06-857); Barry, Ira (03-200); Belair,

motion for reconsideration applies to the 77 as

Laurence (07-588); Berman, Robert (06-856); Boland, John (06-859); Brady, Robert (07-315); Caldwell, Bruce (07-548); Cannon, Nassif, Jr. (02-61); Casamento, Stephen (06-698); Chapman, Bill (05-1225); Clinton, Tommy (04-116); Connell, Thomas (07-62); Corkill, Glen (07-147); Cox, Dean (04-709); Crocker, Jesse (04-903); Crouse, Betty (07-894); Davidson, Arthur (07-196); Davis, Charles (06-624); Davis, Robert (06-697); Davison, Robert (04-1112); Deegan, Edward (06-594); Dhillon, Charanjit (02-1477); Dvoranchik, William (07-231); Donaldson, Robert (03-2875); Dow, Ruth (06-746); Dykstra, Donald (07-309); Ehrenbard, Robert (03-1559); Fazio, Anthony (07-163); Feldman, Merrill (07-224); Fillmore Equipment (07-341); Fournier, E. Haffner (06-933); Gilbertson, Robert (05-934); Goldman, Elise (04-123); Gregory, Jane (06-578); Hackett, James III (05-758); Hastie, J. Drayton (04-291); Hatton, Richard (04-127); Huguera, Teodoro (07-381); Iannacchino, Michael (06-817); Johnson, Richard (03-2339); Johnson, Stanley (04-908); Jones, Palmer (03-2229); Jones, Thomas, Jr. (02-1079); Keefe, Joseph (07-893); Key, Scott (06-293); Lloyd, James (06-623); Ludwig, Gordon (02-1730); Lyons, Edward, Jr. (06-391); Lynn, Nancy (07-564); Marshall, Larry (02-474); Martin, Robert (03-2272); Miller, Edward (05-508); Mitchell, Lewis (07-587); Montgomery, William (03-2273); Moody, Robert (06-752); Morris, John (07-405); Northcutt, Merline (06-860); Oehlschlager, Keith (05-1144); Oldshue, Jerry (06-696); Sadd, William (05-25); Schuler, John (02-432); Sperling, Stanley (02-1523); Strauss, Joseph (06-823); Tanner, Larry (04-1066); Thompson, Richard (06-792); Ungs, Jerome (06-137); Vallari, Stephen (06-761); Vigliotta, John (02-13); Voda, Jan (06-818); Whitaker, Lloyd (02-795); Winternitz, William (01-404); Wyckoff, E. Lisk, Jr. (02-772).

well.[2]

In the present motion, as an alternative, plaintiffs also request that the judgment be vacated for all 77 cases covered by the *Prati* opinion and either: (1) all the cases be stayed pending the resolution by the Federal Circuit of the jurisdictional issues in *Keener v. United States*, 76 Fed. Cl. 455 (2007), *appeal docketed*, 2008-5004 (Fed. Cir. Oct. 19, 2007), or (2) the other 76 cases be consolidated under *Prati*, the judgments be re-entered, and the cases proceed as a single appeal. Pls.'s Mot. for Reconsideration, April 30, 2008, at 2 [Docket #89].

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[2] For efficiency, plaintiffs requested that the motion for reconsideration filed in *Prati* apply to all 77 cases covered by the *Prati* opinion. On June 6, 2008, the Court granted that request. Order Deeming Mot. for Reconsideration to Have Been Filed in 76 Other Cases, June 6, 2008 [Docket #93].

Subsequently, on June 18, 2008, plaintiffs individually filed identical motions styled, "Motion to Perfect the Record," in 74 of the 77 *Prati* cases. These motions seek recognition that plaintiffs' motion for reconsideration and the Court's June 6 Order are deemed filed in each of the *Prati* cases. These motions were, of course, unnecessary given the June 6 Order. Additionally, there is no such motion called a "Motion to Perfect the Record," as evidenced by plaintiffs filing their motions in the electronic case filing (ECF) system as a motion to supplement the administrative record, even though *Prati* and its brethren are not administrative record cases.

In footnote 2 of the plaintiffs' reconsideration motion, plaintiffs' counsel represented that they would file at least four separate motions to vacate in cases covered by the *Prati* opinion because these cases had additional issues left unresolved by that decision. *Id.* Specifically, plaintiffs' counsel identified *Belair* (07-1295), *Boland* (06-859), *Cannon* (02-61), and *Wyckoff* (02-772) as being incorrectly grouped with *Prati* (this despite the fact that the Court relied on the parties' representations that all the 76 cases covered by *Prati*—including these four—contained only the relevant jurisdictional issues). Supplemental Joint Chart, *Isler v. United States*, No. 01-344 [Docket #127].

Furthermore, on May 2, 2008, plaintiffs did indeed file separate motions to vacate—not four of them, but 15.[3] In each of the 15 cases, plaintiffs

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[3] The 15 cases in which motions to vacate were filed are: Arumugam, Velusami (02-1395); Barry, Ira (03-200); Belair, Laurence (07-588); Boland, John (06-859); Corkill, Glen (07-147); Dhillon, Charanjit (02-1477); Dvoranchik, William (07-231); Donaldson, Robert (03-2875); Dykstra, Donald (07-309); Feldman, Merrill (07-224); Fillmore Equipment (07-341); Fournier, E. Haffner (06-933); Johnson, Stanley (04-908); Martin, Robert (03-2272); Northcutt, Merline (06-860). Despite their initial assertion in the motion for reconsideration, plaintiffs' counsel did not file motions to vacate in Cannon, Nassif, Jr. (02-61) or Wycoff, E. Lisk, Jr. (02-772). However, defendant conceded that there may be unresolved issues in those two cases, and

claim that partner-specific claims remain unresolved, and that the judgment should be vacated so that plaintiffs might pursue a judgment on matters not covered by the *Prati* opinion. *See, e.g., Arumugam v. United States*, No. 02-1395 [Docket #19], at 3. To add to this Gordian Knot of confusion, the 15 named cases no longer included *Cannon* and *Wyckoff*—two of the four cases in which plaintiffs' counsel had originally represented that they would include in the individual motions to vacate. Pls.' Mot. for Reconsideration at 2.

As expected, defendant opposed the motion for reconsideration. Def.'s Resp. to Mot. for Reconsideration, May 13, 2008 [Docket #90]. Nevertheless, in its response, defendant did not object to vacating judgment in 17 cases (the 15, plus *Cannon* and *Wycoff*) because it admitted that there are apparently still-unresolved claims in those cases. *Id.* at 6-8.

To clarify matters and hopefully avoid further confusion, the Court conducted a recorded status conference by telephone on May 21, 2008. At the status conference, defendant, despite having previously stipulated to vacating the judgments in cases that apparently contained additional non-jurisdictional issues, raised an objection to

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does not object to the Court vacating the decisions in those two cases in order to determine if unresolved issues indeed remain outstanding.

vacating the judgments in two, *Dhillon* (02-1477) and *Johnson* (04-908), that plaintiffs sought to vacate. Status Conference Tr. at 13. Defendant stated that although it did not originally object to the vacating of the judgments in these two cases, after further review, defendant now believes that all the issues in these two cases were fully covered by *Prati*. *Id.*

Plaintiffs disagreed with defendant's contention that the issues in *Dhillion* and *Johnson* were covered by *Prati*, and when asked about the status of *Cannon* and *Wyckoff*, plaintiffs maintained that these cases may also have additional non-jurisdictional issues, but admitted that it was very possible that the additional issues were no longer legally viable. Status Conference Tr. at 15-17. The parties agreed that one possible solution is to vacate the judgment in 15 cases—the 15 cases in which motions to vacate were filed, minus *Dhillon* (02-1477) and *Johnson* (04-908), plus *Cannon* (02-61) and *Wyckoff* (02-772). Further, plaintiffs would also respond to an "order to show cause" why *Dhillon* and *Johnson* should be vacated, and defendant would have an opportunity to reply. Status Conference Tr. at 18.

Finally, at the status conference, plaintiffs renewed their prior motion for reconsideration for all cases covered by the *Prati* opinion and their motions to vacate the judgment in all 15 of the aforementioned cases that allegedly contain

additional non-jurisdictional issues. In the alternative, if the Court denies the reconsideration motion, plaintiffs asked that, in order to avoid the administrative costs of separate appeals for each judgment in those cases covered by *Prati*, the Court temporarily vacate the judgment in order to allow the consolidation of these cases for appeal of the jurisdictional issues, whereupon judgment can be re-entered upon consolidation. Status Conference Tr. at 21-23. Defendant vehemently disagreed with this approach. *Id.* at 23.

II. DISCUSSION

A. Standard for a Motion for Reconsideration

RCFC 59(a) provides that this Court may grant a "new trial or rehearing or reconsideration . . . to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." It is well recognized that the decision whether to grant reconsideration lies within the discretion of the trial court. *Parsons ex rel. Linmar Prop. Mgmt. Trust v. United States*, 174 Fed. App'x. 561, 562 (Fed. Cir.), *cert. denied*, 127 S. Ct. 323 (2006); *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *see also Keeton Corrections, Inc. v. United States*, 60 Fed. Cl. 251, 253 (2004); *Paalan v. United States*, 58 Fed. Cl. 99, 105 (2003). However, this discretion is bounded by the requirement that a court must

address reconsideration motions with "exceptional care." *Seldovia Native Ass'n, Inc. v. United States*, 36 Fed. Cl. 593, 594 (1996) (quoting *Carter v. United States*, 518 F.2d 1199 (Ct. Cl. 1975)), *aff'd*, 144 F.3d 769 (Fed. Cir. 1998); *Henderson County Drainage Dist. No. 3 v. United States*, 55 Fed. Cl. 334, 337 (2003).

Indeed, to prevail, a motion for reconsideration must be based "upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court." *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 762 (Fed. Cir. 2000); *see also Six v. United States*, 80 Fed. Cl. 694 (2008); *Pacific Gas & Elec. Co. v. United States*, 58 Fed. Cl. 1, 2 (2003); *Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002), *aff'd*, 384 F.3d 1368 (Fed. Cir. 2004). Moreover, the movant must also show that: (a) an intervening change in the controlling law has occurred; (b) evidence not previously available has become available; or, (c) that the motion is necessary to prevent manifest injustice. *See Bishop v. United States*, 26 Ct. Cl. 281, 286 (1992) (citing *Weyerhaeuser Corp. v. Koppers Co.*, 771 F. Supp. 1406, 1419 (D. Md. 1991)); *see also Int'l Air Response, Inc. v. United States*, 81 Fed. Cl. 364, 366 (2008); *Bannum, Inc. v. United States*, 59 Fed. Cl. 241, 243 (2003); *Citizen Fed. Bank, FSB v. United States*, 53 Fed. Cl. 793, 794 (2002). "A court,

therefore, will not grant a motion for reconsideration if the movant merely reasserts . . . arguments previously made . . . all of which were carefully considered by the court." *Ammex, Inc. v. United States*, 52 Fed. Cl. at 557 (internal quotation marks omitted).

B. The Motion for Reconsideration

Turning first to the motion for reconsideration covering all 77 cases under the *Prati* opinion, plaintiffs have failed to meet their burden for reconsideration.

Plaintiffs argue in their motion that the Court erred in its description of TEFRA and should therefore correct "certain statements in its *Prati* opinion that are incorrect as a matter of law so that it does not contribute to the confusion already existing as to TEFRA." Pls.' Mot. for Reconsideration at 3. Plaintiffs next present an argument about their tax settlement agreements with the government, insisting that the settlement agreements were "comprehensive," and thus changed the Pratis' partnership items to non-partnership items. *Id.* at 7-13. Plaintiffs then contend that the *Prati* decision is inconsistent with *McGann v. United States*, 76 Fed. Cl. 745 (2007) ("*McGann I*"), and *McGann v. United States*, 81 Fed. Cl. 642 (2008) ("*McGann II*"), and thus should be reconsidered and reversed. Pls.' Mot. for Reconsideration at 13. Finally, plaintiffs repeat fully-briefed arguments regarding tax-motivated

interest, seeking a reversal of the Court's holding regarding jurisdiction. *Id.* at 14-20.

With regard to plaintiffs' TEFRA challenge, the Court notes that even if it did mischaracterize TEFRA, the alleged mischaracterization simply did not have any effect on the outcome of the case. *See A.A.B. Joint Venture v. United States*, 77 Fed. Cl. 702, 707 (2007) (no reconsideration under RCFC 59 where error, if any, is harmless). The alleged mischaracterization was part of a description of TEFRA, the relevant statutory framework, not a mistake with regard to any specific factual determinations or legal conclusions. Most notably, however, is the fact that the Court's characterization of TEFRA is factually accurate, and comports with similar descriptions of TEFRA made not just by this Court previously, but with descriptions written by the Federal Circuit, the Second Circuit, the Fifth Circuit, the Seventh Circuit, and the Eighth Circuit, just to name a few. *See, e.g., RJT Invs. X v. Comm'r of Internal Revenue*, 491 F.3d 732, 735–37 (8th Cir. 2007); *Weiner v. United States*, 389 F.3d 152, 154–55 (5th Cir. 2004); *Chimblo v. Comm'r of Internal Revenue*, 177 F.3d 119, 120–21 (2d Cir. 1999); *Olson v. United States*, 172 F.3d 1311, 1316–18 (Fed. Cir. 1999); *Kaplan v. United States*, 133 F.3d 469, 471–72 (7th Cir. 1998); *Keener v. United States*, 76 Fed. Cl. 455, 457–59 (2007).

Plaintiffs' other grounds for its motion for reconsideration are similarly without merit. Plaintiffs' arguments regarding the comprehensive nature of their tax settlement agreements with the government are repeated arguments that have already been raised and fully considered. Pls.' Br. in Support of Resp. in Opp. at 15–20 [Docket #74]. Plaintiffs' arguments referencing *McGann I* are also arguments that have been previously raised and considered by this Court. Pls.' Post Trial Br. at 16–20 [Docket #85]. And although *McGann II* was issued after the decision in *Prati*, the decision in *McGann II* was based on arguments considered by this Court previously, and thus does not provide anything new. Finally, plaintiffs' various arguments asking the Court to reconsider its decision regarding jurisdiction over tax-motivated interest are also arguments that have been fully briefed and adjudicated. Pls.' Br. in Support of Resp. in Opp. at 7–8, 30–32 [Docket #74]; Def.'s Reply at 3–5 [Docket #78].

In sum, plaintiffs' motion for reconsideration is comprised of arguments already decided by the Court. These arguments are precisely the type that Rule 59 reconsideration must avoid. RCFC 59. It should be stressed that a motion for reconsideration is not a forum in which a losing party may re-argue its case. *Fru-Con Constr. Corp.*, 44 Fed. Cl. at 300. Ultimately, plaintiffs did not identify an intervening change in the controlling law, bring forth new evidence that was

shown to be previously unavailable, nor did they show in their motion that reconsideration is necessary to prevent manifest injustice. *See Bishop*, 26 Ct. Cl. at 286. Plaintiffs have failed their burden by not demonstrating any error of law nor mistake of fact. Without such demonstrations, or by showing other similar concerns, the demands of justice, far from favoring plaintiffs, favor the defendant.

In the alternative, as stated, plaintiffs seek to vacate judgment in the 77 cases and stay them pending the outcome of the Federal Circuit's decision in *Keener*, or to consolidate the remaining 76 cases for appeal. Plaintiffs request the stay "to preserve the resources of all parties and the courts" and to prevent "fundamental unfairness." Pls.' Mot. for Reconsideration, April 30, 2008, at 21 [Docket #89].

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants," and is left to the sound discretion of the trial court. *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936). In determining whether to grant a stay pending the outcome of another case, the court (1) considers whether there is a "pressing need for the stay," and (2) balances the "interests favoring a stay against interests frustrated by the

action." *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997).

In *Cherokee Nation*, the Federal Circuit held that the desire to "avoid duplicative litigation and conserve judicial resources" was insufficient, by itself, to warrant a stay. *Id.* at 1416. Here, the *Prati* cases have been adjudicated and are ripe for review on the jurisdictional issue and, unlike a stay pending an interlocutory or administrative appeal, concerns about resources and judicial economy are not as relevant. Additionally, the balance of the interests weighs against a stay because there is no hardship or inequity to plaintiffs in forcing them to go ahead with their appeals. Moreover, additional AMCOR jurisdictional cases could benefit the Federal Circuit: If the issues are sufficiently similar, the Federal Circuit could consolidate these *Prati* appeals with *Keener* and reach a single decision with all the relevant cases before the court. Finally, public policy favors "expeditious resolution of litigation." *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1080 (Fed. Cir. 1989). Accordingly, the fact that a companion case is up on appeal is not dispositive of whether the *Prati* cases should be stayed pending its resolution and plaintiffs request is denied.

Finally, plaintiffs request that if the Court will not reconsider or stay the cases, the 76 cases should all be consolidated under *Prati* for purposes

of appeal. Plaintiffs make this request under RCFC 42(a), which provides that, "[w]hen actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated . . . ." *See* Pls.' Mot. for Reconsideration, April 30, 2008, at 22 [Docket #89]; *see also d'Abrera v. United States*, 78 Fed. Cl. 51 (2007); *Cienega Gardens v. United States*, 62 Fed. Cl. 28, 33 (2004); *Karuk Tribe of California v. United States*, 27 Fed. Cl. 429, 433 (1993). Because judgment has already been entered in the cases, however, there is no longer any question of law or fact pending before the Court.

Plaintiffs therefore actually request that the Court vacate judgment in the 77 cases, consolidate them under RCFC 42(a), and, finally, re-enter judgment as one consolidated case. All of this so that plaintiffs' appeal may proceed as one case, not 77. As discussed above, plaintiffs do not meet the grounds required by RCFC 59 to vacate judgment. Consequently, the only ground left to plaintiffs is the monetary convenience gained by filing only one appeal. *See* Pls.' Mot. for Reconsideration, April 30, 2008, at 23 [Docket #89]; Status Conference Tr. at 34, 35; *see also* Fed. Cir. R. 52(a)(3)(A) (setting filing costs at $450 per appeal). Undoubtedly, filing one consolidated appeal is cheaper and quicker than filing 77 individual ones, but administrative convenience is insufficient to justify vacating the judgment under RCFC 59. *See Shirlington*

Limousine & Transp., Inc. v. United States, 78 Fed. Cl. 27, 31 (2007).

While plaintiffs cannot seek consolidation once judgment has been entered, plaintiffs are not without a remedy in the Federal Circuit because plaintiffs can seek consolidation for appeal under the Federal Rules of Appellate Procedure, Rule 3. Moreover, if plaintiffs face financial hardships they can also apply to file their appeals *in forma pauperis*. 28 U.S.C. §1915; Fed. Cir. Form 6; *cf. Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1145 (2d Cir. 1986) (enforcement of a bond requirement for appeal, the posting of which would have caused appellant to go bankrupt, violated appellant's due process rights), *rev'd on other grounds, Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

C. The Fifteen Individual Motions to Vacate, Plus *Cannon* and *Wyckoff*

Turning to the 15 separate motions to vacate and the *Cannon* and *Wyckoff* cases, as observed, plaintiffs recently discovered, and defendant in part agrees, that at least 15 and as many as 17 cases are not fully covered by *Prati* because they have case-specific claims that are not resolved by the jurisdictional determinations of the *Prati* opinion.[4] The Court again notes that it was counsel

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[4] The 15 cases in which final judgments will be vacated are: Arumugam, Velusami 4 (02-1395); Barry, Ira (03-200);

for both parties that advised the Court as to the confluence of the 17 cases with *Prati*. Specifically, on July 17, 2007, the parties jointly filed a chart identifying the various issues alleged in each AMCOR case before the Court. It was the jointly-submitted chart that identified the 77 factually similar cases, and it was the jointly-submitted chart that represented to the Court that the issues in the 17 cases would be conclusively addressed by the *Prati* lead case. Nothing in the jointly-submitted chart indicated to the Court that the 17 cases were factually distinct from the 60 other cases covered by the *Prati* opinion. Had the parties fully explained all the various claims alleged by all the AMCOR plaintiffs as requested by the Court in May 2007, the current confusion regarding the 17 cases would not exist.

Nevertheless, the new information provided to the Court in the motions to vacate and in the May 21 status conference requires the Court to vacate

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Belair, Laurence (07-588); Boland, John (06-859); Corkill, Glen (07-147); Dvoranchik, William (07-231); Donaldson, Robert (03-2875); Dykstra, Donald (07-309); Feldman, Merrill (07-224); Fillmore Equipment (07-341); Fournier, E. Haffner (06-933); Martin, Robert (03-2272); Northcutt, Merline (06-860); Cannon, Nassif Jr. (02-61) and Wycoff, E. Lisk Jr. (02-772). Because defendant objects to the motions to vacate in Dhillon, Charanjit (02-1477) and Johnson, Stanley (04-908), the Court will provide plaintiffs' counsel the opportunity to show cause as to why those decisions should be vacated as well.

the decisions in at least 15 of the 17 cases for the limited purpose of permitting plaintiffs to pursue any unresolved case-specific claims that may still exist. The Court is not reconsidering its opinion in *Prati*—the opinion remains the law in each case. However, the new information provided to the Court regarding the 17 cases meets the burden plaintiffs must show in a motion to vacate. *Fru-Con Constr. Corp.*, 44 Fed. Cl. at 301. To deny the motions, given the new information provided to the Court, would be manifestly unjust. *Id.*

III. CONCLUSION

Having carefully considered plaintiffs' motion for reconsideration, the 15 separate motions to vacate, as well as the parties' multiple representations made during the May 21, 2008 status conference, the Court directs the following:

1) Plaintiffs' May 19, 2008 Motion for Leave to File Reply [Docket #91] is **GRANTED**, and plaintiffs' Reply, filed along with the Motion for Leave, is accepted.

2) Defendant's May 21, 2008 Motion for Leave to File Response [Docket #92] is **GRANTED**, and defendant's Response, filed along with the Motion for Leave, is accepted.

3) The Motion for Reconsideration is **DENIED** in each of the 77 cases covered by the *Prati* opinion.

4) In light of new information provided to the Court by the parties, the judgments in the 15 cases listed in footnote 4 of this Order are **VACATED** for the limited purpose of allowing plaintiffs to pursue any unresolved, case-specific claims that may still be outstanding.

5) Plaintiffs' counsel is **ORDERED** to show cause by August 4, 2008 why the decisions in *Dhillon* (02-1477) and *Johnson* (04-908) should be vacated.

6) Defendant's counsel is **ORDERED** to respond by August 18, 2008 to plaintiffs' show cause brief. No other briefing with regard to *Dhillon* (02-1477) and *Johnson* (04-908) shall be filed by either party after defendant's August 18 response.

IT IS SO ORDERED.

s/Lawrence J. Block
Lawrence J. Block
Judge

In the
United States Court of Federal Claims

No. 02-60 C
(Filed: April 16, 2008)

RONALD C. & MARY G. PRATI,	
Plaintiffs,	**Statutory Interpretation; 26 U.S.C. §§6221, 6229, 6231, 6404, 7422; Jurisdiction; TEFRA; Untimely Assessment; Tax-Motivated Transaction; Abatement.**
v.	
THE UNITED STATES OF AMERICA,	
Defendant.	

Thomas E. Redding and *Teresa J. Womack*, Redding & Associates P.C., Houston, Texas, for plaintiffs.

Bart D. Jeffries, United States Department of Justice, Tax Division, Washington, D.C., with whom was Assistant Attorney General *Eileen J. O'Connor*, for defendant.

OPINION AND ORDER

Block, *Judge*.

This action is representative of 77 factually-similar, so-called "AMCOR" partnership tax refund cases, which are consolidated for the purposes of the instant motions. These partnerships comprised part of a group of similarly-structured California limited partnerships that were marketed and managed by American Agri-Corp., Inc. ("AMCOR"). Beginning in 2001, 129 AMCOR tax refund cases were filed in the U.S. Court of Federal Claims, of which 124 were transferred to this judge for administrative convenience and efficiency reasons by request of the parties.[1] Of the 124 cases, 76 present factual allegations virtually identical to the named representative case.[2] In all 77 of these cases,

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[1] Pursuant to Rules of the U.S. Court of Federal Claims ("RCFC") 40.1(b) and (c).

[2] These 77 cases are: Acker, Nadine (07-215); Adams, Samuel (07-162); Arumugam, Velusami (02-1395); Aylward, Thomas (06-593); Baer, Maurice (06-857); Barry, Ira (03-200); Belair, Laurence (07-588); Berman, Robert (06-856); Boland, John (06-859); Brady, Robert (07-315); Caldwell, Bruce (07-548); Cannon, Nassif Jr. (02-61); Casamento, Stephen (06-698); Chapman, Bill (05-1225); Clinton, Tommy (04-116); Connell, Thomas (07-62); Corkill, Glen (07-147); Cox, Dean (04-709); Crocker, Jesse (04-903); Crouse, Betty (07-894); Davidson, Arthur (07-196); Davis, Charles (06-624); Davis, Robert (06-697); Davison, Robert

plaintiffs invested with an AMCOR partnership, claimed a distributive share of a tax deduction from the AMCOR partnership, subsequently had the claimed deductions rejected by the Internal Revenue Service ("IRS"), and then brought suit in this Court for a refund based on the exact same legal grounds that the named plaintiffs in the representative action assert.

(04-1112); Deegan, Edward (06-594); Dhillon, Charanjit (02-1477); Dvoranchik, William (07-231); Donaldson, Robert (03-2875); Dow, Ruth (06-746); Dykstra, Donald (07-309); Ehrenbard, Robert (03-1559); Fazio, Anthony (07-163); Feldman, Merrill (07-224); Fillmore Equipment (07-341); Fournier, E. Haffner (06-933); Gilbertson, Robert (05-934); Goldman, Elise (04-123); Gregory, Jane (06-578); Hackett, James III (05-758); Hastie, J. Drayton (04-291); Hatton, Richard (04-127); Huguera, Teodoro (07-381); Iannacchino, Michael (06-817); Johnson, Richard (03-2339); Johnson, Stanley (04-908); Jones, Palmer (03-2229); Jones, Thomas Jr. (02-1079); Keefe, Joseph (07-893); Key, Scott (06-293); Lloyd, James (06-623); Ludwig, Gordon (02-1730); Lyons, Edward Jr. (06-391); Lynn, Nancy (07-564); Marshall, Larry (02-474); Martin, Robert (03-2272); Miller, Edward (05-508); Mitchell, Lewis (07-587); Montgomery, William (03-2273); Moody, Robert (06-752); Morris, John (07-405); Northcutt, Merline (06-860); Oehlschlager, Keith (05-1144); Oldshue, Jerry (06-696); Prati, Ronald (02-60); Sadd, William (05-25); Schuler, John (02-432); Sperling, Stanley (02-1523); Strauss, Joseph (06-823); Tanner, Larry (04-1066); Thompson, Richard (06-792); Ungs, Jerome (06-137); Vallari, Stephen (06-761); Vigliotta, John (02-13); Voda, Jan (06-818); Whitaker, Lloyd (02-795); Winternitz, William (01-404); Wyckoff, E. Lisk Jr. (02-772).

In the representative action, plaintiffs Ronald C. Prati and Mary G. Prati ("plaintiffs" or "Pratis") filed the instant action seeking a refund of taxes, interest and penalties paid to the defendant ("United States" or "defendant"). The Pratis are United States citizens who reside in New Smyrna Beach, Florida.[3] The Pratis timely filed their 1985 federal income tax returns and paid the taxes reported due pursuant to that return.

In 1985, Mr. Prati[4] invested in the Agri-Venture Fund ("AVF"), Canyon Desert Vineyards ("CDV"), and Emperor Seedless-85 ("ES-85") partnerships (collectively "the Partnerships"), and became a limited partner in each. These three Partnerships comprised part of a group of similarly- structured California limited partnerships that were marketed and managed by AMCOR. In the early 1980s, AMCOR organized a number of limited partnerships ("AMCOR Partnerships"), for which it acted as the corporate general partner, and solicited investments from individuals around the country. By 1987, the AMCOR Partnerships had

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[3] Unless otherwise noted, all facts listed are undisputed and are taken from Plaintiffs' Original Complaint, Defendant's 2004 Motion to Dismiss (in Part), Plaintiffs' Motion for Partial Summary Judgment, and Defendant's 2006 Brief in Support of Its Motion for Partial Dismissal.

[4] Mary Prati is a party to this proceeding only because she filed a joint tax return with Ronald Prati for 1985.

become the subject of an IRS audit and investigation. The IRS alleged that the AMCOR Partnerships, including AVF, CDV and ES-85, were actually illegal tax shelters. Following the IRS investigation of the AMCOR Partnerships, the IRS disallowed the Pratis' 1985 tax deductions attributable to the Partnerships, and assessed additional taxes and penalty interest against the Pratis for 1985.

The Pratis brought suit in this Court on January 22, 2002, seeking a tax refund of $20,523 and a refund of $39,251.35 for interest and penalty interest for a total of $59,774.35. The Pratis primarily allege that defendant's assessment of taxes, interest and penalty was untimely. In the alternative, the Pratis assert two other bases for their refund request: first, they contend that the defendant's charging of penalty interest for substantial underpayment of taxes attributable to a tax motivated transaction was improper; second, the Pratis argue that the Secretary of the Treasury abused his discretion when he refused to abate the penalty interest accrued against the plaintiffs. Defendant counters that this Court lacks jurisdiction to adjudicate these three claims.

Initially, the AMCOR cases cycled to various judges, following the standard case distribution system employed at the Court of Federal Claims. In October 2002, plaintiffs' attorney and the government filed with the Court a joint notice of

indirectly related cases.[5] In the joint notice, attorneys for both parties asserted that there were common issues of fact and law throughout many of the AMCOR cases in front of the Court. Accordingly, the parties proposed to select three cases to serve as representative cases in which dispositive motions could be filed and common issues could be settled.[6]

The Court heard oral arguments on May 1, 2007, to resolve all pending dispositive motions in the three representative cases. At the hearing, the parties requested that the Court initially adjudicate only all the jurisdictional issues found in the AMCOR cases. Hearing Transcript at 177. On July 17, 2007, the parties jointly filed a chart identifying the various issues alleged in each AMCOR case. The chart revealed that all AMCOR cases fall under two primary categories: (1) Claims for tax years 1984, 1985, or 1986 ("Category 1"

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[5] Joint Notice of Indirectly-Related Cases, *Ronald C. Prati and Mary G. Prati v. United States*, (02-60), document #14, filed October 11, 2002. The Joint Notice was also filed in 23 other cases before the Court.

[6] On January 10, 2003, the parties selected *Isler*, *Prati*, and *Scuteri* to serve as the three representative cases for all the AMCOR cases currently on the Court's docket. The parties asked the Court to stay proceedings in all other AMCOR cases until the Court resolved the three representative cases.

claims); and (2) Claims for any tax year other than '84, '85 or '86 ("Category 2" claims).

Within Category 1, there are three types of claims: (1) Untimely assessment ("UA") refund claims for 1984 and 1985 (based on 26 U.S.C. §6229(a)); (2) Tax-motivated interest ("TMI") refund claims for all three years (based on 26 U.S.C. §6221(c)); and (3) interest abatement ("IA") refund claims for all three years (based on 26 U.S.C. §6404(e)(1)). The three types of claims are jurisdictional in nature, and will be explained with greater specificity below.

Within Category 2, there are two types of claims: (1) basis termination ("BT") claims; and (2) income recapture ("IR") claims. The parties refer to this second category of claims as "global claims"—essentially, they are tax refund requests that deal with years other than 1984, 1985, and 1986, and significantly, are not jurisdictional in nature.

The 77 cases in dispute in this opinion, which include *Prati*, are exclusively Category 1 cases, and thus present solely legal or "pure" jurisdictional issues.[7] These jurisdictional issues are presently

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[7] As to the rest of the cases, the chart revealed that 38 7 of the 124 cases on the docket are exclusively Category 2 cases. These include Anderson, Robert (06-53); Atkinson, Charles (05-1249); Bailey, B. Ralph (06-39); Blinder, Mark (06-52); Chapman, Bill (04-1762); Donaldson, Robert

before the Court in the instant case. The parties submitted supplemental briefing in October, 2007. As will be explained, *Prati* and the other Category 1 family of cases should be dismissed for lack of jurisdiction.

I. BACKGROUND

In the early 1980s, AMCOR organized a number of limited partnerships for which it acted as the

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(01-386); Durr, William (05-932); Ettelson, Donald (05-1004); Farneti, John Jr. (04-1760); Glasser, Mark (05-1141); Golbuff, Alex (05-1224); Hall, Thomas (05-222); Huebner, Gene (04-1742); Holland, David (06- 405); Horsley, Wilson (04-1766); Hubbell, James (05-565); Johnson, Richard (06-398); Keefe, Joseph (05-1402); Kirwan, Martin (05-489); Kraemer, Kenneth (04-1761); Lyon, Donald (04-1324); Malouf, Scott (04-1744); Marks, Paul (04-1763); Martin, Robert (05-1251); McDaniel, George (04- 1788); McGann, Thomas (06-430); Meunier, Gerald (05-880); Morris, John (05-933); Penni, Jonathan (04-1161); Rossman, Neil (07-346); Rutherford, H. Doug (04-1767); Sardinas, Alfredo (05- 1250); Scuteri, Jeffrey (04-1160); Steffansson, Sturla (06-399); Ungs, Jerome (04-1764); Weiner, Morris (01-623); Whittington, G. Dale (05-220); Wong, William (06-404). Eight cases make both Category 1 and Category 2 claims, including *Isler* and *Scuteri*, the other two representative cases. They are: Bolen, Richard (02-696); Isler, Robert (01-344); Lewis, David (02-1080); Mastropieri, Carmen (02-910); McMenamin, Hugh (04-1745); Pineo, Helen (02-401); Prendergast, James (04-1819); Scuteri, Jeffrey (01-358). One case, Penni, Samuel (04-1818), presents neither Category 1 nor Category 2 claims, and instead presents individual estate tax claims.

corporate general partner. The AMCOR Partnerships were agricultural investment entities geared towards high income professionals, and AMCOR solicited investments from such individuals across the country. AMCOR's stated goal was to develop farmland, grow fruit crops such as dates, and other crops such as wheat, corn and alfalfa. Appendix B to Pls.' Response to Def.'s Motion to Dismiss, Tab 6. By 1987, the AMCOR Partnerships had become the subject of an IRS audit and investigation. The IRS alleged that the AMCOR Partnerships, including AVF, CDV and ES-85, were actually illegal tax shelters.

Within six years of its founding, AMCOR had raised a total of $206 million from 3,000 investors who put up cash and notes to pay farmers to grow crops. Investors paid for all the farming expenses up front and deducted that amount invested on their tax returns. Most investors saved as much in taxes as they invested, or even more. For example, an investor who put down $25,000 in cash and signed a $50,000 note could deduct the entire $75,000 from his tax return. At an income tax rate of 50 percent, the maximum at the time, the investor's tax bill would be cut by $37,500. The next year, when the crops were harvested, all proceeds would have been subject to taxes. However, the expense of the agricultural enterprises always exceeded any income realized from the farming activities. Further, the investors could spread out reporting the proceeds from their

investments over ten years. The proceeds could also then be invested through AMCOR into other farming operations, where the money was further sheltered. In effect, by participating in an AMCOR Partnership, an investor could obtain what amounted to an interest-free loan from the government for the unpaid portion of his taxes.

In 1985, Mr. Prati invested $30,000, $45,000, and $30,000 in AVF, CDV, and ES-85, respectively, and became a limited partner in each. The Partnerships were all AMCOR Partnerships, marketed and managed by AMCOR. The stated goal of the Partnerships was to acquire agricultural land, invest in agricultural ventures, and grow crops. Pursuant to AVF's partnership agreement, its general partners were Frederick H. Behrens, CPA, Chairman and a director of AMCOR; George L. Schreiber, President and a director of AMCOR; and Robert A. Wright, Vice President and a director of AMCOR. CDV and ES-85's partnership agreements were structured similarly to the AVF partnership.

The Partnerships timely filed their partnership returns for 1985. Each of the Partnerships reported an ordinary loss for 1985, of which Mr. Prati was allocated a share that he claimed in his personal tax return. The Pratis reported taxable income of $108,845 in 1985. The Pratis recognized and reported the following shares of the Partnership losses in their 1985 tax return:

$89,290 from AVF, $94,893 from CDV, and $66,120 from ES-85, for a total deduction of $250,303.

Following the IRS investigation of the AMCOR partnerships, the IRS issued a notice of final partnership administrative adjustment ("FPAA") to each of the three Partnerships on April 10, 1991, adjusting the amount of deductions the Partnerships claimed in their 1985 tax filings. A notice of FPAA, as will be discussed in more detail below, is the method by which the IRS notifies a partner that the IRS is adjusting an item in that partnership's tax filing.[8] 26 U.S.C. §6223. On July 10, 1991, a notice partner[9] for each of the Partnerships filed a petition for readjustment on behalf of each of the Partnerships in the United States Tax Court. In 1999, Fredrick Behrens, the tax matters partner ("TMP") for each of the Partnerships, filed a notice of election to intervene in each of the Partnerships' readjustment

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[8] Of course, as will be discussed below, partnerships do not pay taxes. 26 U.S.C. §701.

[9] A "notice partner" is a partner who, at the time in question, would be entitled to notice from the government that an adjustment was being made to the tax filing. 26 U.S.C. §6223(a).

petitions.[10] The Pratis did not file an election to intervene in the readjustment petitions.

On March 25, 1997, the Pratis executed three Forms 870-P(AD), Settlement Agreement for Partnership Adjustments, in which they offered to settle their income tax liability for 1985, as it related to Mr. Prati's investment in AVF, CDV, and ES-85.[11] The IRS accepted the offers by countersigning the Forms 870-P(AD) for CDV and ES-85 on April 21, 1997, and for AVF on April 24, 1997. In June of 1997, the IRS informed the Pratis how the agreed-upon adjustments would affect the Pratis' 1985 tax return. The IRS stated that adjustments of $33,369, $42,921, and $26,326 (for AVF, DCV, and ES-85, respectively) would be disallowed from the Pratis' taxable income as originally reported on their 1985 tax return, and how, as a result, the Pratis would owe additional tax of $20,523, due to these adjustments.

On October 10, 1997, the Pratis made an advance payment of $63,875 to the IRS for the Pratis' 1985 tax account. On October 20, 1997, the IRS assessed tax and penalty interest against the

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[10] The TMP is a person or entity designated as such by the partnership under applicable regulations, or most commonly, the general partner with the largest profit stake in the partnership. 26 U.S.C. §6231(a)(7).

[11] A "Form 870-P(AD)" is simply a settlement agreement form used by the IRS.

Pratis for 1985 in the respective amounts of $20,523 and $39,251.35. The IRS then refunded the Pratis $4,100.65, the amount overpaid by the Pratis in their October 10, 1997 advance payment.

On April 16, 1999, the Pratis filed a claim with the IRS for the refund of the additional income tax and penalty interest amounts of $20,523 and $39,251.35. In two letters, dated January 19, 2000 and February 7, 2000, the IRS informed the Pratis that their claims had been denied.

II. DISCUSSION

A. The Tax Equity and Fiscal Responsibility Act of 1982.

Before turning to the parties' contentions, it is helpful to first address the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), the statutory labyrinth in which the parties find themselves. Although noted as "distressingly complex and confusing," see *Rhone-Poulenc Surfactants and Specialties, L.P. v. Comm'r of Internal Revenue*, 114 T.C. 533, 540 (2000), TEFRA originally was enacted to simplify and streamline the procedures by which partnerships are examined for federal taxation purposes.

As mentioned above, a partnership is not a taxable entity. Instead, a partnership is treated as a conduit through which income passes to its partners, who are then responsible for reporting any income or losses on their individual returns.

Partnerships neither incur tax liability, nor do they pay taxes. All taxable events to which a partnership is a party generate tax consequences for its partners, generally to the extent of the partner's interest in the partnership. *See generally* KAREN C. BURKE, FEDERAL INCOME TAXATION OF PARTNERS AND PARTNERSHIPS IN A NUTSHELL (3d ed. 2005).

Prior to TEFRA's enactment, the examination of a partnership for federal tax purposes was an exceedingly tedious process. As with partnerships today, pre-TEFRA partnerships filed informational tax returns, known as Form 1065s. A Form 1065 reflects the distributive share of income, deductions, and credits attributable to each partner. Each partner then filed his own tax return, reflecting his distributive share of the partnership's gains and losses. However, if the IRS deemed it necessary to adjust an item listed on a Form 1065, the IRS was essentially forced to audit each individual partner in a partnership. As a consequence, the IRS could not guarantee consistent treatment of a partnership item for each partner in a partnership.

To remedy this concern, Congress enacted TEFRA. TEFRA "created a single unified procedure for determining the tax treatment of all partnership items as the partnership level, rather than separately at the partner level." *In re Crowell*, 305 F.3d 474, 478 (6th Cir. 2002) (citing H.R.

CONF. REP. NO. 97-760, at 599–600 (1982) ("The tax treatment of items of partnership income, loss, deductions, and credits will be determined at the partnership level in a unified partnership proceeding rather than in separate proceedings with the partners. . . . The tax treatment of any partnership item is to be determined at the partnership level.")). The creation of this "partnership level" proceeding meant that, after TEFRA's enactment, if the IRS wished to adjust items (*e.g.*, deductions for business losses included on a Partnership's Form 1065) it could do so at a singular proceeding, and then subsequently assess all of the partners based upon the adjustment to that particular item. The IRS would not have to conduct individual "partner level" proceedings for each member of a partnership.

Whether TEFRA procedures apply depends on the threshold determination of whether or not an item is a "partnership item." Section 6231 of the tax code provides, in relevant part:

> The term 'partnership item' means, with respect to a partnership item, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provided that, for purposes of this subtitle, such item is more appropriately determined

> at the partnership level than at the partner level.

26 U.S.C. §6231(a)(3). Which items are "more appropriately determined at the partnership level" is refined in Treasury Regulation §301.6231(a)(3)-1, which provides that such items include the income, gains, losses, deductions and credits of a partnership. 26 C.F.R. §301.6231(a)(3)-1. *See also Prochorenko v. United States*, 243 F.3d 1359, 1363 (Fed. Cir. 2001); *Keener v. United States*, 76 Fed. Cl. 455, 458 (2007). Significant to this case, a partnership item is defined by the treasury regulations to also include factors that *affect* the determination of partnership items.

> The term "partnership item" includes the accounting practices and the legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit, gain, loss, deduction, etc.

26 C.F.R. §301.6231(b).

Nonpartnership items are items that are not treated as partnership items, 26 U.S.C. §6231(a)(4), and the tax treatment of nonpartnership items is determined at the individual partner level. *See Crnkovich v. United States*, 202 F.3d 1325, 1328–29 (Fed. Cir. 2000); *Keener*, 76 Fed. Cl. at 458. There exists a third

category of TEFRA items—"affected items"—which are defined as "any item to the extent such item is affected by a partnership item." 26 U.S.C. §6231(a)(5).

A penalty assessed against a partner based on the partner's tax treatment of partnership items on his individual return is an example of an "affected item." *See Olson v. United States*, 172 F.3d 1311, 1316–17 (Fed. Cir. 1999); *Keener*, 76 Fed. Cl. at 458 n.4. If the IRS decides to adjust the tax treatment of any partnership item reflected on the partnership's informational tax return, TEFRA requires the IRS to notify the individual partners through a notice of FPAA.[12] 26 U.S.C. §6223.

There are several timeliness considerations. The general statute of limitations for individual taxpayers is §6501(a), which requires that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed." 26 U.S.C. §6501(a). Before TEFRA, the IRS could not assess a partner based upon a partnership item adjustment if *more than three years had elapsed from the filing of the partner's personal return*; the filing date of the partnership's Form 1065 was for

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[12] A FPAA is the actual adjustment to the partnership item in question. A notice of FPAA is simply the way by which the IRS notifies a partner of the fact that the IRS is adjusting an item in that partnership's tax filing. 26 U.S.C. §6223.

the most part irrelevant. *See* H.R. CONF. REP. NO. 97-760 at 599.

With the enactment of TEFRA, the IRS was given a "buffer," 26 U.S.C. §6229(a), to the normal assessment period. Section 6229(a) provides:

> Except as otherwise provided in this section, the period for *assessing* any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the *later* of–
>
> > (1) the date on which the partnership return for such taxable year was filed, or
> >
> > (2) the last day for filing such return for such year (determined without regard to extensions).

26 U.S.C. §6229(a) (emphasis added). Although not strictly speaking a "statute of limitations," *see Andantech LLC v. Comm'r*, 331 F.3d 972, 977 (D.C. Cir. 2003), §6229(a) allows the IRS to assess partners individually based upon adjustments to partnership items made in an FPAA, so long as the assessment is made within three years of the partnership return's filing.[13] *See AD Global Fund,*

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[13] The three-year period in which to issue a FPAA can by extended by agreement between the IRS and an individual

LLC ex rel. North Hills Holding, Inc. v. United States, 481 F.3d 1351, 1352 (Fed. Cir. 2007) (observing that "[section] 6229(a) does not provide a separate statute of limitations, but simply creates a minimum period that may extend the regular statute of limitations for partnership items").

Significantly, if the FPAA is issued during that window, the assessment need not be made within the same three-year period. It should be noted that it is incorrect to speak of an FPAA as being *untimely*—an FPAA can never be untimely, *i.e.*, a partner cannot object to the issuance of an FPAA or the adjustment of partnership items contained within the FPAA based solely upon the date an FPAA was issued. Timeliness is at issue only to determine the legality of an *assessment* that is based upon *adjustments* to partnership items.

Following the issuance of a FPAA, the TMP initially has the exclusive right to file a petition for readjustment of the partnership items in the Tax Court, the Court of Federal Claims, or a United States District Court. 26 U.S.C. §6226(a). The purpose of a petition is to contest the substantive changes that the IRS has made in the FPAA. If the

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partner (which binds only that partner to that agreement), or by agreement between the IRS and the partnership's TMP (which binds all partners to such an agreement). 26 U.S.C. §6229(b).

TMP does not petition for readjustment, other partners have 60 days to file a petition for readjustment of the partnership items. 26 U.S.C. §6226(b)(1). The court before which a petition for readjustment is brought has jurisdiction to "determine all partnership items of the partnership for the partnership taxable year." 26 U.S.C. §6226(f). This jurisdiction includes the power to make the "proper allocation of [partnership items] among the partners, and [to determine] the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item." *Id.* Hence, the court hearing the petition must determine the proper quantification, qualification and characterization of tax items, such as income, losses, deductions, credits and the like. Upon the conclusion of the partnership level proceedings, within one year, the IRS may assess additional tax liabilities, penalties and interest against individual partners based upon the partnership item adjustments. 26 U.S.C. §6229(d).

In theory, a partner may contest the tax liability by paying the assessment and filing a refund action in the U.S. Court of Federal Claims. 26 U.S.C. §6226(e). Nevertheless, and significantly, §7422(h) of TEFRA limits a partner's ability to seek a refund based on adjustments made to the partnership's return by depriving all courts of jurisdiction to hear partner refund claims where

the refund is "attributable to partnership items (as defined in section 6231(a)(3))." 26 U.S.C. §7422(h).

Alternatively, a partner may choose to settle his individual tax liability with the IRS. 26 U.S.C. §6224. If a partner would so choose, that partner would no longer participate in the partnership level proceeding, and instead would be bound by the terms of his settlement agreement. *Id.* Additionally, any of that settling individual's partnership items would convert to nonpartnership items. 26 U.S.C. §6231(b)(1)(c). Partnership items convert to nonpartnership items when the IRS enters into a settlement agreement with the partner with respect to such items. *Id.* If a partner files an action for a refund attributable to partnership items, but those items have been converted through a settlement agreement, the jurisdictional bar of §7422(h) no longer applies. *See Alexander v. United States*, 44 F.3d 328, 331 (5th Cir. 1995).

Having briefly explained the TEFRA format, the Court is now able to address the parties' various jurisdictional contentions.[14]

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[14] In addition to the jurisdictional contentions, it should be noted that the parties spent a large portion of their briefs arguing over the applicability of the doctrine of *res judicata*. Govt.'s Motion to Dismiss in Part at 28; Pls.' Response to Govt.'s Motion to Dismiss at 22. Specifically, the government contends that even if the Court does have

B. Was the IRS Assessment Untimely?

The Pratis' refund claim is based on the theory that their individual statutes of limitations on assessments had run prior to the time the IRS assessed income taxes and interest against them in 1997. Simply stated, the Pratis contend that because the assessment of additional taxes was made more than three years after the partnership filed its return, the assessment was untimely under §6229(a) and should be refunded to the Pratis. Complaint ¶ 12. Further, the Pratis *sua sponte* raise a defensive contention (*i.e.*, they did not make this argument in response to a contention by the government) that because the Form 870-P(AD) settlements they entered into were executed after the §6229(a) limitations period had expired, they did not waive the statute of limitations. *Id.* It is uncontroverted that the Pratis did not intervene in the partnership level

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jurisdiction over the Pratis' various claims, the Court is barred from hearing the Pratis' claims because the Pratis could have participated in the partnership-level proceedings of their partnerships. Govt.'s Motion to Dismiss in Part at 28. Predictably, the Pratis argue that their claims are not barred by *res judicata*, because their challenges are not partnership items that would be addressed at a partnership-level hearing. Pls.' Response to Govt.'s Motion to Dismiss at 22. Nevertheless, because the Court finds the jurisdictional issues to be dispositive, it need not address the *res judicata* arguments.

proceeding, and therefore did not raise the issue of timely assessments at the Tax Court.
Ex. 14, App. B of Govt.'s Motion to Dismiss in Part.

In response, defendant contends that the limitations-period challenge is a partnership-level defense prohibited by the jurisdictional bar of 26 U.S.C. §7422(h). According to the government, whether §6229(a) extended individual limitations periods on assessments found in §6501 of the Code is a "partnership item" issue that should have been raised at the Tax Court and cannot be raised here. Govt.'s Motion to Dismiss in Part at 20. Defendant argues that if the Court were to determine the timeliness of the assessment, such a determination would affect the assessment for all partners in the Partnerships and would therefore be a partnership-level determination which is barred by §7422(h). *Id.* at 26.

To avoid the jurisdictional bar of §7422(h), plaintiffs assert that the determination of a limitations period does not constitute a partnership item because the provision at issue, §6629(a) of the Internal Revenue Code, lies in subtitle F of the Tax Code, and not in subtitle A.[15]

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[15] Subtitle A of the Internal Revenue Code is entitled "Income Taxes." Subtitle A contains subchapter K, "Partners and Partnerships," which contains requirements for the tax liability of partners. Subtitle F of the Internal Revenue Code is entitled "Procedure and Administration."

Pls' Response to Govt.'s Motion to Dismiss in Part at 9. This is based on plaintiffs' reading of §6231(a)(3) whereby the definition of a partnership item ("any item required to be taken into account for the partnership's taxable year *under any provision of subtitle A*" (emphasis added)) means only such items found in subtitle A. *Id.* According to plaintiffs, because the relevant procedural limitations provisions, §§6229(a) and 6501 of the Tax Code, are found in subtitle F of title 26, a time limitation cannot by definition be considered a partnership item. *Id.*

But this is a strained interpretation. Statutory interpretation must begin with the language of the statute, *Lamie v. United States Trustees*, 540 U.S. 526, 534 (2004); *Electrolux Holdings, Inc. v. United States*, 491 F.3d 1327, 1330 (Fed. Cir. 2007), and its plain meaning from its text, structure, and purpose, *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America Inc.*, 508 U.S. 439, 455 (1993) (commenting that "in expounding a statute, [the Court] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"); *Terry v. Principi*, 340 F.3d 1378, 1385 (Fed. Cir. 2003) (explaining that "when we construe a

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Subtitle F contains subchapter C, "Tax Treatment of Partnership Items," which contains rules relating to the treatment of partnership items, including 26 U.S.C. §§6221, 6229, and 6231.

statute, we do so in the setting of the statutory scheme of which it is a part"); *see also Electrolux Holdings*, 491 F.3d at 1330 (citing *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1110 (Fed. Cir. 2004)).

Application of these common sense strictures reveals that a more reasonable alternative to plaintiffs' interpretation is to view the requirement of "*under any provision of subtitle A*" as modifying not "any [partnership] item" (which, again, is itself defined in subtitle F, not subtitle A) but what immediately precedes it in the clause, which is "the partnership's taxable year." *See* WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 4–5, 59 (4th ed. 1999) (pointing out the rule of grammar that a restrictive clause limits or defines what immediately precedes it and is not set-off by a comma). This makes eminent sense because while subtitle A encompasses substantive rules for a partner's income tax, subtitle A's provisions make clear that this income is derived from the partnership during the partnership's taxable year, as defined by this subtitle. *See River City Ranches #1 Ltd., v. Comm'r of Internal Revenue*, 401 F.3d 1136, 1144 (9th Cir. 2005) (recognizing that because subtitle F provisions administer subtitle A requirements, partnership's tax items affected by subtitle F provisions are litigated in partnership proceedings, not in the partner's). But ultimately, it is the reasonableness of the interpretation that controls. *See Warner-Lambert Co. v. Apotex Corp.*,

316 F.3d 1348, 1355 (Fed. Cir. 2003) (remarking that when "interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take [it] in connection with . . . the whole statute"); *see also Sandberg v. McDonald*, 248 U.S. 185, 204 (1918) (observing that the common law canon "*reddendo singula singulis*[16] . . . . [requires that] words and provisions . . . [relate] to their appropriate objects . . . [thus] resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction"). *See generally* 2A NORMAN J. SINGER, SUTHERLAND STAT. CONSTR. §46:5 (7th ed. 2007) (and cases cited therein) [hereinafter SUTHERLAND STAT. CONSTR.] (noting that words are to be applied to the subjects that seem most properly related by context and applicability pursuant to the canon *reddendo singula singulis*).

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[16] Indeed, the canon *reddendo singula singulis* requires that when a statutory provision contains several antecedent phrases that could modify various other phrases thus supplying differing meanings, the one chosen should be the one most properly related by context and applicability. *See, e.g., Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1412 (9th Cir. 1989) (citing SUTHERLAND STAT. CONSTR. §47:26 to support the application of *reddendo singula singulis*, "interpret[ing] a passage in which antecedents and consequents are unclear by reference to the context and purpose of the statute as a whole"). *See generally* SUTHERLAND STAT. CONSTR. §47:26.

The import of this is that "*any item*" ("required to be taken into account for the partnership's taxable year") necessarily must be given a more expansive interpretation than plaintiffs' interpretation would.[17] Thus, in context, it means *anything* that would *affect* (in plain English, "influence"[18]) the partnership's taxable year, the application of the word "affect" being equivalent here to the provision's phrase "*required to be taken into account*" for the "partnership's taxable year."[19] All of this is merely another way of expressing the

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[17] This principle has long been recognized in constitutional law. Most famous is *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), upholding the legality of the first National Bank by construing the Necessary and Proper Clause, U.S. CONST. art. I, §8, cl. 18, as delegating to Congress broad "implied" power to effectuate the enumerated Article I powers.

[18] "Affect" is defined as "(1) to act upon: to produce an effect (as of disease) upon, to produce a material influence upon or alteration" or "(2) to have a detrimental influence on—used especially in the phrase affecting commerce, to INFLUENCE." MERRIAM-WEBSTER UNABRIDGED DICTIONARY, http://unabridged.merriam-webster.com/cgi-bin/

[19] This is implicit in the reasoning of *Slovacek v. United States*, 36 Fed. Cl. 250, 255 (1996), whereby whether the period of assessment has been extended by TEFRA and therefore a partnership item is equated to whether it "affects" the "amount, timing and characterization" of partnership items "in thumbs-up or thumbs-down manner."

axiom that in construing statutes, courts may determine appropriate meaning by considering the policy behind a law's enactment. *See, e.g., Holloway v. United States*, 526 U.S. 1, 9 (1999) (noting that "statutory language should be interpreted consonant with 'the provisions of the whole law, and . . . its object and policy'"); *Star- Glo Assocs., LP v. United States*, 414 F.3d 1349, 1357 (Fed. Cir. 2005) (considering the purpose of a statute to determine the meaning of an ambiguous term in the statutory text). This is particularly so when construing tax and revenue measures due to the importance of policy in avoiding a literal woodenness creating unworkable or absurd results. *See Coltec Industries, Inc. v. United States*, 454 F.3d 1340, 1354 (Fed. Cir. 2006) (construing "economic substance test" in light of policy underlying tax code, "the economic substance doctrine is not unlike other canons of construction that are employed in circumstances where the literal terms of a statute can undermine the ultimate purpose of the statute"); *see also United States v. Native Village of Unalakleet*, 411 F.2d 1255, 1258 (Ct. Cl. 1969) (observing that, at times, a court may "construe the statute contrary to its 'plain language' if a literal interpretation makes a discrimination for which no rational ground can be suggested.").

To be sure, the Court's reading permits treating, as partnership items, any and all legal issues that influence the treatment of partnership

items arising under subtitle A. This construction is in accord with the purpose of TEFRA: "a statutory scheme that intends that adjustment to a partnership tax return be completed in one consistent proceeding before individual partners are assessed for partnership items." *AD Global*, 481 F.3d at 1355 (internal citations omitted); see In re Crowell, 305 F.3d at 478 (citing H.R. CONF. REP. NO. 97-760, at 599–600 (1982)); *see also Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (opining that particular statutory provisions must be interpreted in connection with the whole statute "and the objects and policy of the law, as indicated by its various provisions"). Indeed, even if one accepts plaintiffs' interpretation, nothing would prevent a court from looking outside subtitle A to effectuate §6231(a)(3). *See River City Ranches # 1 Ltd.*, 401 F.3d at 1144 (holding that the assessment provisions in subtitle F may be considered partnership items); *Clark v. United States*, 68 F. Supp. 2d 1333, 1345 (N.D. Ga. 1999) (same); *see also Kaplan*, 133 F.3d at 473 (subtitle F provisions involving authority of TMP may be considered partnership item); *Klein v. United States*, 86 F. Supp. 2d 690, 696 (E.D. Mich. 1999) (same). Furthermore, tax treatment uniformity is furthered because if the TMP does not raise the timeliness issue, a partner could certainly intervene at the appropriate proceeding. 26 U.S.C. §6226(c)(2).

This interpretation is consistent with, even buttressed by, the application of the separate, yet related, technical statutory definition of an "affected item" (defined by 26 U.S.C. §6231(a)(5) as any "item to the extent such item is affected by a partnership item"), addressed by the court in *Keener*, 76 Fed. Cl. at 460–61. There, as here, the court faced the argument that because the assessment periods under section 6501 are unique to each partner, the assessment periods are "affected items" under §6231(a)(5)) and thus the Tax Court could not have reached a determination concerning the partner in the partnership-level proceeding. *Id.*; *see* TREAS. REG. §301.6231(a)(5)-1(a).

Although there is not unanimity of analysis, most courts have concluded that there are two types of affected items. The first is a computational adjustment "made to reflect change in a partner's tax liability resulting from partnership-level adjustments." *Korchak v. Comm'r of Internal Revenue*, 90 T.C.M. (CCH) 403 at *20 (2005) (citing *N.C.F. Energy Partners v. Comm'r of Internal Revenue*, 89 T.C. 741, 744 (1987)). The second requires a determination that must be made at a partnership level. *Id.* The *Keener* court explained that because the tax treatment of an "affected item" usually depends upon the partnership-level determination, "affected items generally cannot be tried as part of a partner's tax case prior to the completion of the partnership-level proceeding."

Keener, 76 Fed. Cl. at 460–66 (citing *GAF Corp. & Subs. v. Comm'r of Internal Revenue*, 114 T.C. 519, 528 (2000) (quoting *Gillilan v. Comm'r of Internal Revenue*, 66 T.C.M. (CCH) 398, 401 (1993))); *see also Katz v. Comm'r of Internal Revenue*, 335 F.3d 1121, 1124 (10th Cir. 2003); *Clark*, 68 F. Supp. 2d at 1347. *But see Field v. United States*, 328 F.2d 58, 60 (2d Cir. 2003) (holding that §6621(c) interest is not an "affected item" because it "turns on matters that are specific to individual partners"). *See generally* ARTHUR B. WILLIS, JOHN S. PENNELL & PHILIP F. POSTLEWAITE, PARTNERSHIP TAXATION [HEREINAFTER "PENNELL"] ¶ 20.02[4][c] (6th ed. 1999) (and cases cited therein).

Accordingly, partners must first raise any partnership item that "affects" their personal items at the unified partnership-level proceeding. Here, the proper construction of §6229(a), as explained above, certainly falls into that category. The result from the partnership-level proceeding is then applied at the individual partner level "to the extent that it impacts what otherwise is a nonpartnership item-in this case, the limitations period on assessments." *Keener*, 76 Fed. Cl. at 460. In other words, partners "must first raise any partnership item that 'affects' their personal items at the partnership-level proceeding" and "obtain resolution of the partnership prong of their affected items before later turning to the affected

nonpartnership prong." *Id.* at 461. This the Pratis did not do.[20]

To be sure, whether categorized as a "partnership item" or as an "affected item," the Court is without jurisdiction to adjudicate the statute of limitations issue plaintiffs raise in this partner-level proceeding. This is because any resulting refund here would be "attributable to" partnership items within the meaning of §7422(h), *see Braunstein v. Comm'r of Internal Revenue*, 374 U.S. 65, 70 (1963) ("attributable" defined as "caused or generated by"); *Gilman v. Comm'r of Internal Revenue*, 933 F.2d 143, 151 (2d Cir. 1991) ("attributable" means "stems from"); *Keener*, 76 Fed. Cl. at 461–62, or are partnership items that influence affected items, such as partnership items falling within the partnership prong of an affected item, *see Katz v. Comm'r of Internal Revenue*, 335 F.3d 1121, 1124 (10th Cir. 2003); *Clark*, 68 F. Supp. 2d at 1347.

What is more, the relevant Treasury Regulation defining a "partnership item" as including "the

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[20] And, as the *Keener* court points out, it is worth repeating that even if the TMP fails to raise the issue, "section 6226(c) of the Code entitles a partner to participate fully as a party in the partnership proceeding, presumably allowing such a partner to raise [such] issues." *Id.* (citing *Clark v. United States*, 68 F. Supp.2d at 1345–46 (discussing this provision)).

legal and factual determinations that underlie the determination of the amount, timing, and characterization of items of income, credit gain, loss, deduction, etc.," Treas. Reg. §301.6231(a)(3)-1(b), reflects this Court's approach. And although a court has a duty to independently interpret the relevant statutory provisions and their construction or application to the case at bar—*Chevron U.S.A. Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *see also Electrolux Holdings, Inc.*, 491 F.3d 1327—in the realm of tax law, some nod to judicial deference to the IRS's interpretation of its own rules and regulations is recognized. *See Welch v. Helvering*, 290 U.S. 111 (1933) (stating that determinations of the IRS commissioner are presumptively correct). This notice of disallowance is consequentialist in nature, looking at pragmatic results that apply a reasonableness standard both in interpretation and application, the latter usually encompassing how the agency interpretation affects statutory language, structure, and mandates.

A good and simple example is *United States v. Correll*, 389 U.S. 299 (1967). Correll, a traveling salesman, brought suit for a refund of taxes paid. Customarily leaving home early each morning, but eating breakfast and lunch on the road and

returning home at night for dinner, Correll had deducted the cost of his morning and noon meals as "traveling expenses" incurred in the pursuit of his business "while away from home" under §162(a)(2) of the tax code of 1954. *Id.* at 300. Nevertheless, the Commissioner disallowed the deductions, ruling unless the daily trips required sleep or rest (which they did not) the cost of the meals was a "personal living" expense. *Id.* In upholding the Commissioner's interpretation of the relevant statutory provisions, the Supreme Court noted that the role of the judiciary "begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner." *Id.* at 307. While conceding that alternative interpretations to the Commissioner's "sleep or rest" rule could be crafted, the Court noted that in reviewing tax law, courts should not "sit as a committee of revision to perfect the administration of tax laws." *Id.* at 306–07.[21] This approach has been followed post-*Chevron*. *See, e.g.*, *United States v. Cleveland Indians Baseball Co.*,

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[21] This is because "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code . . . it is the province of Congress and the Commissioner to make the appropriate adjustments." *Correll*, 389 U.S. at 307 (internal citations omitted).

532 U.S. 200, 219 (2001) (the judiciary should "defer to the Commissioner's regulations as long as they 'implement the congressional mandate in some reasonable manner'") (quoting *United States v. Correll*, 389 U.S. 299, 307 (1967)); *Hospital Corp. of America & Subsidiaries v. Comm'r of Internal Revenue*, 348 F.3d 136, 141 (6th Cir. 2003); *Grapevine Imports, Ltd. v. United States*, 71 Fed. Cl. 324, 336 (2006).

Furthermore, it is also worth noting that other courts addressing similar challenges have rejected plaintiffs' position. *See, e.g., Weiner v. United States*, 389 F.3d 152 (5th Cir. 2004); *Chimblo v. Comm'r*, 177 F.3d 119 (2d Cir. 1999); *Kaplan v. United States*, 133 F.3d 469 (7th Cir. 1998); *Williams v. United States*, 165 F.3d 30 (6th Cir. 1998) (unpublished table decision); *Barnes v. United States*, 1997 WL 732594 at *3 (M.D. Fla. July 25, 1997), *aff'd*, 158 F.3d 587 (11th Cir. 1998); *Thomas v. United States*, 967 F. Supp. 505 (N.D. Ga. 1997); *Slovacek v. United States*, 36 Fed. Cl. 250 (1996); cf. *RJT Investments X v Comm'r of Internal Revenue*, 491 F.3d 732, 736–38 (8th Cir. 2007) (holding that the determination of the validity of a partnership is more appropriately determined at partnership level); *Hirshfield v United States*, 2001 WL 579783 (S.D.N.Y. 2001) (holding that a challenge to a TMP's authority to act on behalf of the partners is a partnership level challenge), *aff'd*, 70 Fed. Appx. 609 (2d Cir. 2003);

Klein v. United States, 86 F. Supp. 2d 690 (E.D. Mich. 1999) (same). Indeed, this Court, most recently, in *Keener*, 76 Fed. at 460, characterized plaintiffs' arguments as "well-rehearsed" but "faulty."

The first case dealing with this issue was *Slovacek v. United States*, 36 Fed. Cl. 250 (1996). The plaintiffs in *Slovacek*, like the Pratis here, sought a refund of taxes they paid pursuant to a settlement agreement with the IRS, claiming the taxes assessed against them were assessed after the expiration of a period of limitations. *Id.* at 254. The government there similarly argued that the plaintiffs' claims were barred by §7422(h), and the plaintiffs countered with the argument that their claim was not a partnership item. The court in *Slovacek* reasoned that because the statute of limitations could "affect" the amount, timing and characterization of income, etc., at the partnership level, the challenge must be litigated at the partnership level proceeding. *Id.* at 255.

In *Chimblo v. Comm'r*, 177 F.3d 119, the Second Circuit also addressed this issue, with similar results. The plaintiffs in *Chimblo*, like the Pratis, were members of a partnership who had their deductions attributable to the partnership disallowed by the IRS. Like the Pratis, these plaintiffs did not intervene in the partnership-level tax proceedings, and only after settling their case with the IRS, did they challenge the timeliness of

their assessment. The Second Circuit stated that "[a]llowing individual taxpayers to raise a statute of limitations defense in the multiple partner-level proceedings would undermine TEFRA's dual goals of centralizing the treatment of partnership items and ensuring the equal treatment of partners." *Id.* at 125. Accordingly, in applying the policy behind TEFRA, the Second Circuit held that the plaintiffs were barred from raising their statute of limitations defense in a partner-level proceeding. *Id.*

A similar untimely-assessment argument was also addressed by the Seventh Circuit in *Kaplan v. United States*, 133 F.3d 469 (7th Cir. 1998). The Kaplans, like the Pratis, were members of a partnership who claimed their distributive share of partnership loss deductions in their personal tax returns. Eleven years after the tax year in question, the Kaplans were notified by the IRS that some of their partnership deductions were disallowed, and that they owed penalties and interest on their overdue taxes. Unlike the Pratis, the Kaplans claimed they never received notice of the partnership's FPAA, and as a result, they should not owe any penalty or interest on any tax deductions disallowed. Without the Kaplans' knowledge, the partnership's TMP had executed time period extensions with the IRS. The Kaplans challenged the validity of their TMP's authority to act as the TMP for the partnership. They further argued that if the TMP lacked authority to execute

the extensions, then the statute of limitations had run on their assessment, and they were not liable for any taxes disallowed. *Id.* at 473.

However, the Seventh Circuit was not swayed by the Kaplans' arguments. If the Kaplans were to succeed with their claim, it would affect the tax liability of all of the other partners. *Id.* "This is precisely the type of challenge prohibited by TEFRA in light of Congress's decision that such suits are better addressed in one fell swoop at the 'partnership level' than in countless suits by individuals partners." *Id.* Accordingly, the Seventh Circuit held that it lacked subject matter jurisdiction over the Kaplans' refund claim and affirmed the lower court's dismissal of the case. While the Kaplans' challenge was slightly different than the Pratis' challenge, the applicability of the Seventh Circuit's holding is clear—challenges to partnership level items are more properly heard at the partnership level, and may not be heard in a subsequent partner-level proceeding, even if the results are harsh.

In *Weiner v. United States*, 389 F.3d 152, a case factually identical to the *Prati* case at bar, the Fifth Circuit reached the same conclusion as the Second and Seventh Circuit in *Chimblo* and *Kaplan*.[22] The plaintiffs in *Weiner*, like the Pratis,

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[22] Another similar Fifth Circuit decision is *Treaty Pines Inv. P'ship v. Comm'r of Internal Revenue*, 967 F.2d 206

were members of an AMCOR-organized limited partnership and reported their proportional share of partnership losses on their personal income tax returns. Just like the Pratis' deductions, the plaintiffs' deductions in *Weiner* were subsequently disallowed by the IRS. The plaintiffs entered into settlement agreements with the IRS, and, after entering into the settlement agreements, argued that the assessments of tax and interest were untimely. Like the Pratis here, in order to avoid the jurisdictional bar of §7422(h), the plaintiffs then argued that their challenge under §6229(a) was not a partnership item because §6229(a) was located in Subtitle F of the tax code and not in Subtitle A. However, the Fifth Circuit was not persuaded by those plaintiffs' argument. Relying on the reasoning of the Second and Seventh Circuits in *Chimblo* and *Kaplan*, the Fifth Circuit held that it lacked jurisdiction to decide the timely assessment issue: "because the FPAA limitations issue affects the partnership as a whole, it should not be litigated in an individual partner proceeding, as such a result would contravene the

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(5th Cir. 1992). In *Treaty Pines*, the Fifth Circuit held that the Tax Court has jurisdiction at the partnership level to determine whether a settlement agreement with the IRS is valid. *Id.* at 210. The Fifth Circuit went on to state that once a partnership-level court determines a settlement is valid, it no longer had jurisdiction over the individual items because the settlement agreement changes the partnership items to nonpartnership items. *Id.*

purposes of TEFRA." *Id.* at 156–57. In addition, the Fifth Circuit found the language of 26 C.F.R. §301.6231(a) to be persuasive, holding that "the treasury regulations have implicitly included the statute of limitations determination within the definition of 'partnership item.'" *Id.* at 157.

To counter the weight of all this existing case law, plaintiffs cite *Prochorenko v. United States*, 243 F.3d 1359 (Fed. Cir. 2001), as precedent that allegedly shows that this Court does have jurisdiction over plaintiffs' untimely assessment claim. Although it is binding on this Court, *Prochorenko* is clearly distinguishable and does not support the proposition for which it is cited.

In *Prochorenko*, the taxpayers claimed deductions on their personal tax returns based on their proportional share of a partnership's losses. After conducting an audit, the IRS disallowed the deductions, and issued a notice of FPAA. Several partners elected to challenge the FPAA in the Tax Court, and while the appeal was pending, several other partners entered into a settlement agreement with the IRS under terms that were more favorable than those in the FPAA. *Id.* at 1361. The Prochorenkos did not enter into a settlement with the IRS, instead choosing to appeal the FPAA to the Tax Court and then the Second Circuit, both of which upheld the FPAA. *Id.* After conclusion of the appeal, another couple, the Colittis, "through [the] administrative grace" of the

IRS, still managed to enter into a settlement agreement consistent with the original settlement that the nonchallenging partners entered into before the Tax Court and Second Circuit confirmed the FPAA. *Id.* Thereafter, the Prochorenkos sought to enter into a settlement consistent with the terms of the settlement the Colittis received.

When the IRS denied the Prochorenkos' request, the Prochorenkos filed suit in the Court of Federal Claims, seeking a reduction of their tax liability based on the Colittis' settlement. *Id.* at 1362. The Federal Circuit affirmed this Court's determination that a partner's right to request consistent settlement terms is not a partnership item. *Id.* "Whether or not the Prochorenkos were entitled to such a reduction is an issue that is entirely dependent on their own unique factual circumstances, and has no effect on and is not affected by the tax liability of any of the other partners . . . . [T]his is not the type of issue that is 'more appropriately determined at the partnership level.'" *Id.* at 1363.

Seizing on the determination that a request for consistent settlement terms is not a partnership item, the Pratis assert that their claim is similarly not a partnership item, and therefore not subject to the §7422(h) jurisdictional bar. Pls.' Resp. to Govt.'s Motion to Dismiss at 15. Nonetheless, the Pratis' challenge is factually different than the Prochorenkos' consistent-settlement request.

Unlike the Prochorenkos' consistent-settlement request, the Pratis' challenge deals with determinations related to the partnership as a whole, not matters that are unique to the Pratis themselves. The resolution of whether the Pratis' assessment was timely would be based on partnership-level determinations that affect other partners's returns. Accordingly, as explained above, this Court cannot hear the Pratis' challenge, as this Court lacks jurisdiction over the Pratis' untimely-assessment argument.

Finally, this Court agrees with the court in *Keener* that, like the plaintiffs in that case, plaintiffs here have waived their limitations objection. Because they could have pursued their limitations defense in the earlier partnership-level proceeding, but chose not to do so, "t he jurisprudence of both the Tax Court and this Court suggest that the limitations argument they now raise is not jurisdictional, but rather was an affirmative defense that, by their actions, was waived." *Keener*, 76 Fed. Cl. at 462 (citing *United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1333–34 (Fed. Cir. 1999); *Columbia Bldg., Ltd. v. Comm'r of Internal Revenue*, 98 T.C. 607, 611–12 (1992); *cf. John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006) (statute of limitations in 28 U.S.C. §2501 is jurisdictional and not waived), *aff'd*, 128 S. Ct. 750 (2008)). And like *Keener*, this Court holds that plaintiffs' tax settlement agreement with the IRS

does "not render the above cases inapposite." *See Keener*, 76 Fed. Cl. at 463.

It is true that §6231(b)(1)(C) of the Code does convert partnership items into nonpartnership items when "the Secretary enters into a settlement agreement with the partner with respect to such items," and thus items previously treated as partnership items can become "individualized," rendering §7422(h) inapplicable. *See Keener*, 76 Fed. Cl. at 464; *Slovacek*, 40 Fed. Cl. at 829–30; *Olson*, 37 Fed. Cl. at 733. But the only items converted fall under the term "with respect to such items," that is, "such items" actually settled by an agreement.[23] The limitations contention, not being

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[23] The view that "such items" refers only to those items actually covered by an agreement is fortified by *Keener*'s construction of several other subparagraphs in §6231(b)(1), such as §6231(b)(1)(A), which provides that "partnership items shall become nonpartnership items as of the date the Secretary mails to such partner a notice that 'such items' shall be treated as nonpartnership items," *Keener*, 76 Fed. Cl. at 464, and §6231(b)(2)(B)(I), which states that this notice may be provided "as to one or more of such [partnership] items" the connotation being that "less than all the available partnership items need be converted." *Id.* Construing these subparagraphs in a coherent and consistent manner, *see, e.g.*, *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 88–89 (1934); *Fortec Constr. v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985), the court rightly maintained that the meaning of "such items" can refer only to those items actually settled or agreed

part of any settlement agreement, is thus not converted into a nonpartnership item.

For the Court to hold to the contrary would create an absurd result undercutting congressional intent in enacting TEFRA. As explained by the Fifth Circuit in *Weiner*—

> partners could settle with the IRS and thus eliminate their ability to participate in and be bound by the result of any partnership-level proceeding. But if, as here, the Tax Court decided the substantive statute of limitations issue against the partnership, the settling partners could simply bring individual partner-level suits in the district courts and attempt to obtain a different ruling on the statute of limitations issue. Thus, some partners would be required to pay the assessed deficiency, while others would not. The result advocated by the taxpayers here is at odds with TEFRA's goal of consolidating decisions that affect the partnership as a whole.

Weiner, 389 F.3d at 158.

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upon. *Keener*, 76 Fed. Cl. at 464–65.

C. Does Jurisdiction Lie To Consider Pratis' Claim That Interest Assessed under 26 U.S.C. §6621(c) Was Improper?

The government contends that this Court lacks jurisdiction under §7422(h) to adjudicate plaintiffs' claim that the IRS erred in asserting interest against them under the former "sham transaction" provision of 26 U.S.C. §6621(c) (*repealed* 1990), because the determination of partnership sham transactions are partnership items that should have been challenged by the Pratis at the partnership level proceeding after the IRS issued the notice of FPAA. Govt.'s Motion for Partial Dismissal of Plaintiffs' Complaint at 8. The government further contends that because the Pratis entered into partial settlement agreements after the FPAA was issued, and the settlement agreements did not cover the FPAA sham transactions, the Pratis are bound by the FPAA determination. *Id.* at 18.

In response to the government's jurisdictional argument, plaintiffs assert that their refund claim is not a partnership item, and claim that the reasoning of *Field v. United States*, 328 F.3d 58 (2d Cir. 2003) and *Prochorenko*, 243 F.3d 1359, support them. Pls.' Brief in Support of his Opposition to the Govt.'s Motion for Partial Dismissal at 10. The Pratis also maintain that the settlements agreements in which they entered were complete settlements, and thus they were not

bound by the FPAA determination that the partnerships' transactions were shams. *Id.*

The Pratis also move for summary judgment with regard to their §6621(c) penalty interest refund claim, asserting that the penalty interest assessed against them under §6621(c) was improper as a matter of law. Pls.' §6621(c) Motion for Partial Summary Judgment at 14. The Pratis contend that the settlement agreements in which they entered did not express any specific grounds for the disallowance of their deductions so they do not preclude their challenge to the penalty interest. *Id.* at 15. The Pratis further state that, by allowing almost two-thirds of the Pratis' claimed deductions in their settlements, the IRS implicitly agreed that the deductions were not shams under the formula used by the IRS in imposing the penalty interest. *Id.* at 28.

Turning to the merits of the parties' arguments, the starting point must be analysis of the controlling statute. Enacted in 1984 and repealed in 1990,[24] §6621(c) imposed a penalty rate at 120 percent of the statutory interest rate when the IRS determined that the taxpayer's substantial underpayment of taxes was attributable to

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[24] The Senate sponsor of the repealing legislation not unreasonably described the penalty structure of the 1986 tax code as a "morass of inconsistency and irrationality." 135 CONG. REC. S13893-07 (1989).

so-called "tax-motivated transactions."[25] In relevant part, §6621(c) provided:

> [W]ith respect to any substantial underpayment attributable to tax motivated transactions, the annual rate of interest established under this section shall be 120 percent of the underpayment rate. . . .
>
> For purposes of this subsection, the term "tax motivated transaction" means . . . any sham or fraudulent transaction.

26 U.S.C. §6221(c). Subsection (c)(3) of 26 U.S.C. §6221, defined "tax motivated transactions" as "any loss disallowed by reason of section 465(a)" and "any sham or fraudulent transaction." 26 U.S.C. §6621(c)(3)(ii), (v).

Section 465, the so-called "at risk" provision, was added to the Code in 1976 to prevent the

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[25] Upon enactment in 1984, this provision was codified as 26 U.S.C. §6621(d). It was amended and redesignated as 26 U.S.C. §6621(c) by the Tax Reform Act of 1986, Pub.L. No. 99-514, 100 Stat. 2744, §1511(c)(1)(A)–(C). Section 6621(c) applies to interest accruing after December 31, 1984, even if the transaction were entered into before the date of its enactment. Tax Reform Act of 1984, §144(c), Pub. L. No. 98-369, Div. A, July 18, 1984, 98 Stat. 494 (1984). Despite its repeal, §6 S. REP. NO. 621(c) remains applicable to tax years prior to 1989. *See* 94-938 at 47–49 (1976); *see also Comm'r of Internal Revenue v. Tufts*, 461 U.S. 300, 309 n.7 (1983).

creation of tax shelters through which taxpayers could effectively avoid any financial risk. It provides that an individual's loss deductions shall be allowed "only to the extent . . . to which the taxpayer is at risk." 26 U.S.C. §465(a)(1). A taxpayer is considered "at risk" for an activity for the amount of money contributed to that activity, or any amount borrowed for that activity. 26 U.S.C. §465(b). A taxpayer is not considered "at risk" for "amounts protected against loss through nonrecourse financing, guarantees, stop loss agreements, or other similar arrangements." 26 U.S.C. §465(b)(4). With regard to an "at risk" determination, logic dictates that it is the individual partner who is the "taxpayer" to whom these "at risk" rules apply, since partnerships do not qualify as taxpayers for purposes of the Code. Nevertheless, courts addressing the matter "must often consider not only what the partner contributed to the partnership, but the nature of the obligations flowing among the partner, the partnership, and, at times, third-parties." *Keener*, 76 Fed. Cl. at 467. Thus, "several cases directly involving the 'at risk' provisions have concluded that their application is not a 'nonpartnership item,' but rather an affected item." *Id.* (citing *Ginsburg v. Comm'r of Internal Revenue*, 127 T.C. 75, 92–93 (2006); *Greenberg Bros. P'ship # 4 v. Comm'r of Internal Revenue*, 111 T.C. 198, 202 (1998); *Hambrose Leasing 1984-5 Ltd. P'ship v. Comm'r of Internal Revenue*, 99 T.C. 298, 312–13

(1992); *Roberts v. Comm'r of Internal Revenue*, 94 T.C. 853, 861 (1990)).[26]

The "sham or fraudulent transaction" prohibition prong of 26 U.S.C. §6221(c)(3), the prong at issue in the instant case, is a more difficult nut to crack. In fact, case law has developed two differing "tests" for identifying shams. The Fourth Circuit has adopted a two-prong standard providing that "[t]o treat a transaction as a sham, the court must find that the taxpayer was motivated by no business purposes other than obtaining tax benefits . . . and that the transaction has no economic substance because no reasonable possibility of a profit exists." *Rice's Toyota World Inc. v. Comm'r of Internal Revenue*, 752 F.2d 89, 91 (4th Cir. 1985). Notwithstanding, a majority of the circuits follow a more flexible test developed by the Ninth Circuit, whereby "the consideration of business purpose and economic substance are simply more precise factors to consider in the [determination of] whether the transaction had any practical economic effects

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[26] Accordingly, "issues involving items such as the nonrecourse character of partnership notes or the economic substance of partnership transactions are to be resolved in a partnership-level proceeding, with those determinations then being binding on the partners in any refund litigation that would ensue." *Keener*, 76 Fed. Cl. at 467 (citing *Greenberg Bros. P'ship*, 111 T.C. at 202; *Hambrose Leasing*, 99 T.C. at 312).

other than the creation of income tax losses." *Sochin v. Comm'r of Internal Revenue*, 843 F.2d 351, 354 (9th Cir. 1988); *see also Winn-Dixie Stores, Inc. v. Comm'r of Internal Revenue*, 254 F.3d 1313, 1316 (11th Cir. 2001); *True v. United States*, 190 F.3d 1165, 1177 n.11 (10th Cir. 1999); *CM P'ship v. Comm'r of Internal Revenue*, 157 F.3d 231, 247 (3d Cir. 1998); *DeMartino v. Comm'r of Internal Revenue*, 862 F.2d 400, 406 (2d Cir. 1998); *Rose v. Comm'r of Internal Revenue*, 868 F.2d 851, 854 (6th Cir. 1989).

What is paramount, however, is that when determining sham or fraudulent transactions, under either of the two tests, courts have concluded that the determination must be done on the partnership level. *See Transpac Drilling Venture, 1983-2 by Dobbins v. United States*, 32 Fed. Cl. 810, 820 (1995), *aff'd*, 83 F.3d 1410 (Fed. Cir. 1996); *Nault v. United States*, 2007 WL 465310 at *4–*5 (D.N.H. Feb. 9, 2007); *see also Keener*, 76 Fed. Cl. at 468. This is because "[t]he focus is on the *partnership*'s motivation for entering into the relevant business transaction, 'not on an individual partner's motive for joining the partnership.'" *Keener*, 76 Fed. Cl. at 468 (citing *Tallal v. Comm'r of Internal Revenue*, 778 F.2d 275, 276 (5th Cir. 1985) (emphasis added).

This unanimity, however, breaks down on the issue of whether the *imposition of interest* under §6621(c) may be raised at the partner level. On one

side, some courts have held that §6621(c) interest is an affected item and not a partnership item, but have interpreted the term "affected item" in a manner (unlike this Court) allowing jurisdiction to challenge the propriety of §6621(c) interest assessment in a partner level proceeding. *See Field v. United States*, 328 F.3d at 59 (holding that the §6621(c) interest being authorized by a provision in subtitle F of the Code, and not specifically within the regulatory definition contained in Treas. Reg. §301.6231(a)(3)-1, is an affected item that can be challenged at a partner-level proceeding); *see also Klein v. United States*, 86 F. Supp. 2d at 698 n.12; *Korchak*, 90 T.C.M. at 416; *Affiliated Equipment Leasing II v. Comm'r of Internal Revenue*, 97 T.C. 575 (1991). On the other side of the ledger, courts (like this one) have held that challenges to §6621 interest must be made at the *partnership* level, not at the partner level. *See River City Ranches #1 Ltd. v. Comm'r of Internal Revenue*, 401 F.3d 1136, 1143 (9th Cir. 2005) (holding that the sham nature of the partnerships' transactions is a "partnership item" because it is required to be taken into account . . . under . . . [the income tax provisions] of subtitle A" thus affecting the income tax of the individual partners); *see also Keener*, 76 Fed. Cl. at 468–70; *Ertz v. Comm'r of Internal Revenue*, 2007 WL 174133 (T.C. Jan 24, 2007).

Although the *River City Ranches #1 Ltd.* court did not delve into the minutiae of tax technicality

concerning the distinction between a "partnership item" and an "affected item," its reasoning is sound and should control regardless of which category is applied. *See Keener*, 76 Fed. Cl. at 468–71. This is particularly true if, as here, the §6621(c) "tax-motivated transaction" claimed is alleged to be a sham transaction—obviously, what constitutes a sham perpetrated by members of the partnership must be resolved initially in a partnership-level proceeding before any refund action lies to determine whether interest should be imposed on an individual partner.[27] Indeed, going full circle by applying the lessons learned in the prior section, it is clear that plaintiffs were given notice by assertions specifically made in the 1991 FPAA that one of the issues in the partnership proceeding was to be whether the partnership's activities constituted a sham transaction that lacked economic substance. Plaintiffs chose to settle their tax liability, and by not challenging the sham transaction allegations, they cannot now be heard on this issue. This Court simply has no jurisdiction.

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[27] The requirement of an initial resolution at the partnership level also applies to penalties imposed pursuant to the "at risk" rules of §465, to the extent that penalty interest involves the nonrecourse character of partnership notes or the economic substance of partnership transactions.

D. Is the Abuse of Discretion for Failure To Abate Claim Viable?

The Pratis' second alternative claim is that the Secretary of the Treasury abused his discretion when he refused to abate the penalty interest accrued against the Pratis, pursuant to 26 U.S.C. §6404(e)(1). Section 6404 provides, in part:

> The Secretary is authorized to abate the unpaid portion of the assessment of any tax or any tax liability in respect thereof . . . .
>
> (e) (1) In the case of any assessment of interest on (a) any deficiency attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Internal Revenue service (acting in his official capacity) in performing a ministerial or managerial act . . . the Secretary may abate the assessment of all or any part of such interest for any period.

26 U.S.C. §6404. The Pratis claim that interest accrued during the IRS's investigation of the Partnerships should be abated, as the investigation was full of unreasonable errors and delays by IRS officials acting in their official capacity.

This Court does not need to resolve this issue, being bound by the Supreme Court decision in *Hinck v. United States*, 127 S. Ct. 2011 (2007), *aff'g* 446 F.3d 1307 (Fed. Cir. 2006). In affirming the

Federal Circuit in *Hinck*, the Supreme Court held that the district courts and the Court of Federal Claims lack jurisdiction to hear cases regarding the abatement of interest attributable to unreasonable errors and delays by the IRS—only "the Tax Court provides the exclusive forum for judicial review of a refusal to abate interest under §6404(e)(1) . . . ." 127 S. Ct. at 2013. Therefore, the Pratis' request for review of abatement of interest pursuant to 26 U.S.C. §6404 must be dismissed. This Court is bound by controlling authority. *See Coltec Industries, Inc.*, 454 F.3d at 1353 ("there can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims").

III. CONCLUSION

For the forgoing reasons, the motions of the United States are **GRANTED** because the Court finds that it does not have jurisdiction to hear the plaintiffs' challenge to the timeliness of their tax assessment, as well as their alternative tax-motivated interest penalty and tax abatement claims. Accordingly, all claims by the plaintiffs are hereby **DISMISSED** for lack of jurisdiction and plaintiffs' motion for summary judgment is **DENIED**. Furthermore, it is **ORDERED** that all 76 other related cases cited in footnote 2 of this opinion are hereby **DISMISSED** for lack of jurisdiction. Additionally, the Court notes that

orders in the cases Isler, 01-344 T, Scuteri, 01-358 T, and Penni, 04-1818 T, will be issued requesting the parties to confer and file a Joint Status Report by May 16, 2008, regarding how best to proceed with the other cases enumerated in footnote 7.

IT IS SO ORDERED.

s/Lawrence J. Block
Lawrence J. Block

Judge

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 09–1036

DORETHA H. HENDERSON, AUTHORIZED REPRESENTATIVE OF DAVID L. HENDERSON, DECEASED, PETITIONER *v.* ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[March 1, 2011]

JUSTICE ALITO delivered the opinion of the Court.

A veteran whose claim for federal benefits is denied by the Board of Veterans' Appeals may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court). To do so, the veteran must file a notice of appeal with the Veterans Court within 120 days after the date when the Board's final decision is properly mailed. 38 U.S.C. §7266(a). This case presents the question

whether a veteran's failure to file a notice of appeal within the 120-day period should be regarded as having "jurisdictional" consequences. We hold that it should not.

I

A

The Department of Veterans Affairs (VA) administers the federal program that provides benefits to veterans with service-connected disabilities. The VA has a two-step process for the adjudication of these claims. First, a VA regional office receives and processes veterans' claims and makes an initial decision on whether to grant or deny benefits. Second, if a veteran is dissatisfied with the regional office's decision, the veteran may obtain *de novo* review by the Board of Veterans' Appeals. The Board is a body within the VA that makes the agency's final decision in cases appealed to it. §§7101, 7104(a).

The VA's adjudicatory "process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985). A veteran faces no time limit for filing a claim, and once a claim is filed, the VA's process for adjudicating it at the regional office and the Board is *ex parte* and nonadversarial, 38 CFR §§3.103(a), 20.700(c) (2010). The VA has a statutory duty to assist veterans in developing the evidence necessary to

substantiate their claims. 38 U.S.C. §§5103(a) (2006 ed., Supp. III), 5103A (2006 ed.). And when evaluating claims, the VA must give veterans the "benefit of the doubt" whenever positive and negative evidence on a material issue is roughly equal. §5107(b). If a regional office denies a claim, the veteran has a generous one-year time limit to initiate an appeal to the Board. §7105(b)(1); 38 CFR §20.302(a). A veteran may also reopen a previously denied claim at any time by presenting "new and material evidence," 38 U.S.C. §5108, and decisions by a regional office or the Board are subject to challenge at any time based on "clear and unmistakable error," §§5109A,7111.

Before 1988, a veteran whose claim was rejected by the VA was generally unable to obtain further review. 38 U.S.C. §211(a) (1988 ed.).[1] But the Veterans' Judicial Review Act (VJRA), 102 Stat. 4105 (codified, as amended, in various sections of 38 U.S.C. (2006 ed. and Supp. III)), created the Veterans Court, an Article I tribunal, and authorized that court to review Board decisions

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[1] Section 211(a) did not foreclose judicial review of constitutional challenges to veterans' benefits legislation, *Johnson v. Robison*, 415 U.S. 361, 366–374 (1974), or of challenges to VA benefits regulations based on later-in-time statutes that the VA did not administer exclusively, *Traynor v. Turnage*, 485 U.S. 535, 541–545 (1988).

adverse to veterans.[2] §§7251, 7252(a) (2006 ed.). While proceedings before the Veterans Court are adversarial, see §7263, veterans have a remarkable record of success before that tribunal. Statistics compiled by the Veterans Court show that in the last decade, the court ordered some form of relief in around 79 percent of its "merits decisions."[3]

Review of Veterans Court decisions on certain issues of law is available in the United States Court of Appeals for the Federal Circuit. §7292. Federal Circuit decisions may in turn be reviewed by this Court by writ of certiorari.

B

David Henderson served in the military during the Korean War. In 1992, the VA gave Henderson a 100-percent disability rating for paranoid schizophrenia, and in 2001, he filed a claim for supplemental benefits based on his need for in-home care. After a VA regional office and the Board denied his claim, he filed a notice of appeal

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[2] When such an appeal is taken, the Veterans Court's scope of review, §7261, is similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. §706.

[3] See United States Court of Appeals for Veterans Claims, Annual Reports 2000–2009, http://uscourts.cavc.gov/documents/Annual_Report_FY_2009_October_1_2008_to_September_30_2009.pdf (as visited Feb.25, 2011, and available in Clerk of Court's case file).

with the Veterans Court, but he missed the 120-day filing deadline by 15 days. See §7266(a).

The Veterans Court initially dismissed Henderson's appeal as untimely. It concluded that Henderson was not entitled to equitable tolling of the deadline because he had not shown that his illness had caused his tardy filing. Later, the court granted Henderson's motion for reconsideration, revoked the dismissal, and set the case for argument. While Henderson's appeal was pending, however, we decided *Bowles v. Russell*, 551 U.S. 205 (2007). In *Bowles*, we held that the statutory limitation on the length of an extension of the time to file a notice of appeal in an ordinary civil case, 28 U.S.C. §2107(c) (2006 ed., Supp.III), is "jurisdictional," and we therefore held that a party's failure to file a notice of appeal within that period could not be excused based on equitable factors, or on the opposing party's forfeiture or waiver of any objection to the late filing. *Bowles*, *supra*, at 213–214.

After we announced our decision in *Bowles*, the Veterans Court directed the parties to brief that decision's effect on prior Federal Circuit precedent that allowed the equitable tolling of the 120-day deadline for filing a notice of appeal in the Veterans Court. A divided panel of the Veterans Court concluded that *Bowles* compelled jurisdictional treatment of the 120-day deadline and dismissed Henderson's untimely appeal for

lack of jurisdiction. *Henderson v. Peake*, 22 Vet. App. 217 (2008).

Henderson then appealed to the Federal Circuit, and a divided en banc court affirmed. 589 F.3d 1201 (2009). We granted certiorari. 561 U.S. ___ (2010).

II

In this case, as in others that have come before us in recent years, we must decide whether a procedural rule is"jurisdictional." See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___ (2010); *Union Pacific R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. ___ (2009); *Bowles*, *supra*; *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004). This question is not merely semantic but one of considerable practical importance for judges and litigants. Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system. Under that system, courts are generally limited to addressing the claims and arguments advanced by the parties. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356–357 (2006). Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do

not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press. See *Arbaugh*, *supra*, at 514.

Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants. For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times. See *Sanchez-Llama*, *supra*, at 356–357. Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. *Arbaugh*, 546 U.S., at 508. Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. *Ibid.* And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.

Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term. We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction. *Reed Elsevier*, *supra*, at ___ (slip op., at 6); *Kontrick*, *supra*, at 455. Other rules, even if important and mandatory, we have said, should not be given the

jurisdictional brand. See *Union Pacific*, 558 U.S., at ___ (slip op., at 12).

Among the types of rules that should not be described as jurisdictional are what we have called "claim-processing rules." These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. *Id.*, at ___ (slip op., at 14); *Eberhart*, *supra*, at 19; *Scarborough*, *supra*, at 413–414; *Kontrick*, *supra*, at 455–456. Filing deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules. Accordingly, if we were simply to apply the strict definition of jurisdiction that we have recommended in our recent cases, we would reverse the decision of the Federal Circuit, and this opinion could end at this point.

Unfortunately, the question before us is not quite that simple because Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule. See *Bowles*, *supra*, at 212–213. The question here, therefore, is whether Congress mandated that the 120-day deadline be"jurisdictional." In *Arbaugh*, we applied a "readily administrable bright line" rule for deciding such questions. 546 U.S., at 515–516. Under *Arbaugh*, we look to see if there is any "clear" indication that Congress wanted the rule to be "jurisdictional." *Ibid.* This approach is suited to

capture Congress' likely intent and also provides helpful guidance for courts and litigants, who will be "duly instructed" regarding a rule's nature. See *id.*, at 514–515, and n. 11.

Congress, of course, need not use magic words in order to speak clearly on this point. "[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant." *Reed Elsevier*, *supra*, at ___ (slip op., at 13). When "a long line of this Court's decisions left undisturbed by Congress," *Union Pacific*, *supra*, at ___ (slip op., at 13), has treated a similar requirement as "jurisdictional," we will presume that Congress intended to follow that course. See *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133–134, 139 (2008).

III

With these principles in mind, we consider whether Congress clearly prescribed that the deadline for filing a notice of appeal with the Veterans Court should be "jurisdictional."

A

Contending that the 120-day filing deadline was meant to be jurisdictional, the Government maintains that *Bowles* is controlling. The Government reads *Bowles* to mean that all statutory deadlines for taking appeals in civil cases are jurisdictional. Since §7266(a) establishes a statutory deadline for taking an appeal in a civil

case, the Government reasons, that deadline is jurisdictional.

We reject the major premise of this syllogism. *Bowles* did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional. Instead, *Bowles* concerned an appeal from one court to another court. The "century's worth of precedent and practice in American courts" on which *Bowles* relied involved appeals of that type. See 551 U.S., at 209–210, and n. 2.

Contending that *Bowles*' reasoning extends to the judicial review of administrative decisions, the Government relies on *Stone v. INS*, 514 U.S. 386 (1995). There, without elaboration, we described as " 'mandatory and jurisdictional' " the deadline for seeking review in the courts of appeals of final removal orders of the Board of Immigration Appeals. *Id.*, at 405 (quoting *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990)). The Government also notes that lower court decisions have uniformly held that the Hobbs Act's 60-day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. §2344, is jurisdictional. Brief for United States 18.

Petitioner correctly observes, however, that Veterans Court review of a VA decision denying benefits differs in many respects from court of appeals review of an agency decision under the Hobbs Act. Cf. *Shinseki v. Sanders*, 556 U.S. ___,

___ (2009) (slip op., at 15) ("Congress has made clear that the VA is not an ordinary agency"). And there is force to petitioner's argument that a more appropriate analog is judicial review of an administrative decision denying Social Security disability benefits. The Social Security disability benefits program, like the veterans benefits program, is "unusually protective" of claimants, *Heckler v. Day*, 467 U.S. 104, 106–107 (1984). See also *Sims v. Apfel*, 530 U.S. 103, 110–112 (2000) (plurality opinion). Indeed, the Government acknowledges that "the Social Security and veterans-benefit review mechanisms share significant common attributes." Brief for United States 16. And long before Congress enacted the VJRA, we held that the deadline for obtaining review of Social Security benefits decisions in district court, 42 U.S.C.§405(g), is not jurisdictional. *Bowen v. City of New York*, 476 U.S. 467, 478, and n. 10 (1986); *Mathews v. Eldridge*, 424 U.S. 319, 328, n. 9 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 763–764 (1975).

In the end, however, none of the precedents cited by the parties controls our decision here. All of those cases involved review by Article III courts. This case, by contrast, involves review by an Article I tribunal as part of a unique administrative scheme. Instead of applying a categorical rule regarding review of administrative decisions, we attempt to ascertain Congress' intent

regarding the particular type of review at issue in this case.

B

Several factors convince us that the 120-day deadline for seeking Veterans Court review was not meant to have jurisdictional attributes.

The terms of the provision setting that deadline, 38 U.S.C. §7266(a), do not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences. Section 7266(a) provides:

> "In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title."

This provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [Veterans Court]," *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). If Congress had wanted the 120-day time to be treated as jurisdictional, it could have cast that provision in language like that in the provision of the VJRA that governs Federal Circuit review of decisions of the Veterans Court. This latter provision states that Federal Circuit review must be obtained

"within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts." §7292(a). Because the time for taking an appeal from a district court to a court of appeals in a civil case has long been understood to be jurisdictional, see *Bowles*, *supra*, at 209–210, and n. 2, this language clearly signals an intent to impose the same restrictions on appeals from the Veterans Court to the Federal Circuit. But the 120-day limit at issue in this case is not framed in comparable terms. It is true that §7266 is cast in mandatory language, but we have rejected the notion that "all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." *Union Pacific*, 558 U.S., at ___ (slip op., at 12) (quoting *Arbaugh*, 546 U.S., at 510; internal quotation marks omitted). Thus, the language of §7266 provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes.

Nor does §7266's placement within the VJRA provide such an indication. Congress placed §7266, numbered §4066 in the enacting legislation, in a subchapter entitled "Procedure." See VJRA, §301, 102 Stat. 4113, 4115–4116. That placement suggests Congress regarded the 120-day limit as a claim-processing rule. Cf. *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text"). Congress elected not to place the 120-day limit in

the VJRA sub-chapter entitled "Organization and Jurisdiction." See 102 Stat. 4113–4115.

Within that subchapter, a separate provision, captioned "Jurisdiction; finality of decisions," prescribes the jurisdiction of the Veterans Court. *Id.*, at 4113–4114. Subsection (a) of that provision, numbered §4052 in the enacting legislation, grants the Veterans Court "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.*, at 4113. It also prohibits the court from hearing appeals by the VA Secretary. Subsection (b) limits the court's review to "the record of proceedings before the [VA]," specifies the scope of that review, and precludes review of the VA's disability ratings schedule. *Ibid.* Nothing in this provision or in the "Organization and Jurisdiction" sub-chapter addresses the time for seeking Veterans Court review.

While the terms and placement of §7266 provide some indication of Congress' intent, what is most telling here are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims. "The solicitude of Congress for veterans is of longstanding." *United States v. Oregon*, 366 U.S. 643, 647 (1961); see also *Sanders*, 556 U.S., at ___ (slip op., at 15). And that solicitude is plainly reflected in the VJRA, as well as in subsequent

laws that "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions," *id.*, at ___ (Souter, J., dissenting) (slip op., at 2). See, *e.g.*, Veterans Claims Assistance Act of 2000, 114 Stat. 2096; Act of Nov. 21, 1997, 111 Stat. 2271; VJRA, §103, 102 Stat. 4106–4107.

The contrast between ordinary civil litigation—which provided the context of our decision in *Bowles*—and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic. In ordinary civil litigation, plaintiffs must generally commence their suits within the time specified in a statute of limitations, see 28 U.S.C. §1658, and the litigation is adversarial. Plaintiffs must gather the evidence that supports their claims and generally bear the burden of production and persuasion. Both parties may appeal an adverse trial-court decision, see §1291, and a final judgment may be reopened only in narrow circumstances. See Fed. Rule Civ. Proc. 60.

By contrast, a veteran seeking benefits need not file an initial claim within any fixed period after the alleged onset of disability or separation from service. When a claim is filed, proceedings before the VA are informal and nonadversarial. The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, the VA

must give the veteran the benefit of any doubt. If a veteran is unsuccessful before a regional office, the veteran may obtain *de novo* review before the Board, and if the veteran loses before the Board, the veteran can obtain further review in the Veterans Court. A Board decision in the veteran's favor, on the other hand, is final. And even if a veteran is denied benefits after exhausting all avenues of administrative and judicial review, a veteran may reopen a claim simply by presenting "new and material evidence." Rigid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would clash sharply with this scheme.

We have long applied "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hospital*, 502 U.S. 215, 220–221, n. 9 (1991); see also *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Particularly in light this canon, we do not find any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag.

The Government argues that there is no reason to think that jurisdictionally time-limited review is inconsistent with a pro-veteran administrative scheme because, prior to the enactment of the VJRA in 1988, VA decisions were not subject to

any further review at all. Brief for United States 29. The provision at issue here, however, was enacted as part of the VJRA, and that legislation was decidedly favorable to veterans. Accordingly, the review opportunities available to veterans before the VJRA was enacted are of little help in interpreting 38 U.S.C.§7266(a).

IV

We hold that the deadline for filing a notice of appeal with the Veterans Court does not have jurisdictional attributes. The 120-day limit is nevertheless an important procedural rule. Whether this case falls within any exception to the rule is a question to be considered on remand.[4]

The judgment of the United States Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAGAN took no part in the consideration or decision of this case.

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[4] The parties have not asked us to address whether the 120-day deadline in 38 U.S.C. §7266(a) is subject to equitable tolling, nor has the Government disputed that the deadline is subject to equitable tolling if it is not jurisdictional. See Brief for Petitioner 18. Accordingly, we express no view on this question.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOSEPH KEEFE and MARGUERITE KEEFE, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2008-5116, -5118, -5119, -5120, -5121, -5122, -5123, -5124, -5125, -5126, -5127, -5128, -5130, -5131, -5132, -5133, -5134, -5135, -5136, -5137, -5138, -5140, -5141, -5142, -5143, -5144, -5145, -5146, -5147, -5148, -5149, -5150, -5151, -5152, -5154, -5155, -5156, -5157, -5158, -5159, -5160, -5161, -5162, -5163, -5164, -5165, -5166, -5167, -5168, -5169, -5170, -5171, and -5172

Appeals from the United States Court of Federal Claims in various cases, Judge Lawrence J. Block.

ON MOTION

ORDER

The United States moves to consolidate the above-captioned appeals for further proceedings.* The appellants oppose. The United States replies.

Upon consideration thereof:

IT IS ORDERED THAT:

(1) The motions are granted to the extent that when each side files its response as directed by the court's June 22, 2009 order, the response must be combined to include all of the above-captioned cases. Each side's response should use the combined caption indicated above, for purposes of filing the combined response. Each side's combined response should not exceed 30 pages. Each side must provide sufficient copies to the clerk's office to allow a copy for each case file and three additional copies for use by the court, i.e., 56 copies.

(2) Dispositive motions may also be filed by using the combined caption indicated above, if appropriate, or by using the separate captions for the cases. Any dispositive motions are due within the time for filing the responses as directed by the court's June 22, 2009 order. The time for filing a response to a dispositive motion is governed by

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* Solely for the purposes of this order and the responses, the court has combined the captions for the various appeals and otherwise abbreviated the caption. The cases are not consolidated and the official captions have not been revised.

Fed. R. App. P. 27(a)(3)A). If a dispositive motion is filed using the combined caption, then the single response to that motion must also use the combined caption. If a dispositive motion is filed using the combined caption, then each side must provide sufficient copies to the clerk's office to allow a copy for each case file and three additional copies for use by the court.

(3) The cases are not consolidated.

FOR THE COURT,

JUN 10 2010
Date

/s/ Jan Horbaly
Clerk

cc: Sallie W. Gladney, Esq.
Deborah K. Snyder, Esq.

s8

Stamped

Filed
U.S. Court of Appeals for
the Federal Circuit

JUN 10 2010

Jan Horbaly
Clerk

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOSEPH KEEFE and MARGUERITE KEEFE, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2008-5116, -5118, -5119, -5120, -5121, -5122, -5123, -5124, -5125, -5126, -5127, -5128, -5130, -5131, -5132, -5133, -5134, -5135, -5136, -5137, -5138, -5140, -5141, -5142, -5143, -5144, -5145, -5146, -5147, -5148, -5149, -5150, -5151, -5152, -5154, -5155, -5156, -5157, -5158, -5159, -5160, -5161, -5162, -5163, -5164, -5165, -5166, -5167, -5168, -5169, -5170, -5171, and -5172

Appeals from the United States Court of Federal Claims in various cases, Judge Lawrence J. Block.

ON MOTION

Before LOURIE, MAYER, AND DYK, Circuit Judges. DYK, Circuit Judge.

ORDER

The United States moves to summarily affirm the judgments of the United States Court of Federal Claims in the above-captioned appeals.* The appellants oppose. The United States replies. The appellants move to continue to stay these cases pending the disposition by the United States Supreme Court of petitions for writ of certiorari related to this court's combined decision in *Prati v. United States*, 2008-5117, 603 F.3d 1301 (Fed. Cir. 2010) and *Deegan v. United States*, 2008-5129, 603 F.3d 1301. In the alternative, the appellants move to stay these cases pending disposition of two additional representative cases to resolve what appellants assert are remaining unresolved issues.

On June 22, 2009, this court stayed proceedings in the above-captioned cases pending disposition of two representative cases, *Prati v. United States*, 2008-5117 and *Deegan v. United States*, 2008-5129. In these two cases, the taxpayers claimed that they were due refunds on two grounds: first, they argued that the Internal Revenue Service assessed tax and interest after the statute of limitations expired. Second, the taxpayers argued they were due refunds of penalty interest paid because their underpayments were not attributable to "tax motivated transactions." This court affirmed the Court of Federal Claims' determination that the

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* For purposes of this order, we use a combined caption. The cases are not consolidated.

taxpayers' claims for refunds were attributable to partnership items and thus not within that court's jurisdiction.

Summary affirmance of a case is appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). In the above-captioned cases, the appellants' claims are the same as the claims asserted in either *Prati* or *Deegan*. Based on our decision in *Prati*, it is clear that summary affirmance is warranted in all the above-captioned appeals. We see no basis for staying these cases pending disposition of petitions for writ of certiorari in *Prati* and *Deegan*.

Accordingly,

IT IS ORDERED THAT:

(1) The appellants' motions to continue the stay are denied.

(2) The United States' motions to summarily affirm are granted.

(3) Each side shall bear its own costs.

FOR THE COURT,

DEC 09 2010
Date

Jan Horbaly
Clerk

cc: Sallie W. Gladney, Esq.
Deborah K. Snyder, Esq.

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Stamped

Filed
U.S. Court of Appeals for
the Federal Circuit

DEC 09 2010

Jan Horbaly
Clerk

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE I, SECTION 8, CLAUSE 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . . .

. . . .

ARTICLE I, SECTION 8, CLAUSE 9

The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court; . . . .

. . . .

ARTICLE III, SECTION 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

. . . .

ARTICLE III, SECTION 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between Citizens of different States,—between Citizens of the same State claiming Lands under the Grants of different States.

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

INTERNAL REVENUE CODE (26 U.S.C.)

SEC. 6226. JUDICIAL REVIEW OF FINAL PARTNERSHIP ADMINISTRATIVE ADJUSTMENTS

(a) PETITION BY TAX MATTERS PARTNER.—Within 90 days after the day on which a notice of a final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable year with—

(1) the Tax Court,

(2) the district court of the United States for the district in which the partnership's principal place of business is located, or

(3) the Claims Court.

(b) PETITION BY PARTNER OTHER THAN TAX MATTERS PARTNER—

(1) IN GENERAL.—If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), file a petition for a readjustment of the partnership items for the taxable year involved with any of the courts described in subsection (a).

* * * *

(c) PARTNERS TREATED AS PARTIES.—If an action is brought under subsection (a) or (b) with respect to a partnership for any partnership taxable year—

(1) each person who was a partner in such partnership at any time during such year shall be treated as a party to such action, and

(2) the court having jurisdiction of such action shall allow each such person to participate in the action.

[§6226(d)(1) Effective for Tax Years 1984-1986]

(d) PARTNER MUST HAVE INTEREST IN OUTCOME.—

(1) IN ORDER TO BE PARTY TO ACTION.—Subsection (c) shall not apply to a partner after the day on which—

(A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, or

(B) the period within which any tax attributable to such partnership items may be assessed against that partner expired.

[§6226(d) Effective for Tax Years Ending After August 5, 1997]

(d) PARTNER MUST HAVE INTEREST IN OUTCOME.—

(1) In order to be party to action.—Subsection (c) shall not apply to a partner after the day on which—

(A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, or

(B) the period within which any tax attributable to such partnership items may be assessed against that partner expired.

Notwithstanding subparagraph (B), any person treated under subsection (c) as a party to an action shall be permitted to participate in such action (or file a readjustment petition under subsection (b) or paragraph (2) of this subsection) solely for the purpose of asserting that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.

(2) TO FILE PETITION.—No partner may file a readjustment petition under subsection (b)

unless such partner would (after the application of paragraph (1) of this subsection) be treated as a party to the proceeding.

* * * *

[§6226(f) Effective for Tax Years 1984-1986]

(f) SCOPE OF JUDICIAL REVIEW.—A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates and the proper allocation of such items among the partners.

[§6226(f) Effective for Tax Years Ending After August 5, 1997]

(f) SCOPE OF JUDICIAL REVIEW.—A court with which a petition is filed in accordance with this section shall have jurisdiction to determine all partnership items of the partnership for the partnership taxable year to which the notice of final partnership administrative adjustment relates, the proper allocation of such items among the partners, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to a partnership item.

SEC. 6229. PERIOD OF LIMITATIONS FOR MAKING ASSESSMENTS

(a) GENERAL RULE.—Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

(b) EXTENSION BY AGREEMENT.—

(1) IN GENERAL.—The period described in subsection (a) (including an extension period under this subsection) may be extended—

(A) with respect to any partner, by an agreement entered into by the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before the expiration of such period.

* * * *

(d) SUSPENSION WHEN SECRETARY MAKES ADMINISTRATIVE ADJUSTMENT.—If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended—

(1) for the period during which an action may be brought under section 6226 (and, if an action an action with respect to such administrative adjustment is brought during such period, until the decision of the court in such action becomes final), and

(2) for 1 year thereafter.

* * * *

SEC. 6231. DEFINITIONS AND SPECIAL RULES

(a) DEFINITIONS.—For purposes of this subchapter—

* * * *

(3) PARTNERSHIP ITEM.—The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is

more appropriately determined at the partnership level than at the partner level.

(4) NONPARTNERSHIP ITEM.—The term "nonpartnership item" means an item which is (or is treated as) not a partnership item.

(5) AFFECTED ITEM.—The term "affected item" means any item to the extent such item is affected by a partnership item.

* * * *

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION

(a) GENERAL RULE.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * *

SEC. 6621. DETERMINATION OF RATE OF INTEREST

* * * *

(c) INTEREST ON SUBSTANTIAL UNDERPAYMENTS ATTRIBUTABLE TO TAX MOTIVATED TRANSACTIONS.—

(1) IN GENERAL.—In the case of interest payable under section 6601 with respect to any substantial underpayment attributable to tax motivated transactions, the rate of interest established under this section shall be 120 percent of the underpayment rate established under this subsection.

(2) SUBSTANTIAL UNDERPAYMENT ATTRIBUTABLE TO TAX MOTIVATED TRANSACTIONS.—For purposes of this subsection, the term "substantial underpayment attributable to tax motivated transactions" means any underpayment of taxes imposed by subtitle A for any taxable year which is attributable to 1 or more tax motivated transactions if the amount of the underpayment for such year so attributable exceeds $1,000.

(3) TAX MOTIVATED TRANSACTIONS.—

(A) In general.—For purposes of this subsection, the term "tax motivated transaction" means—

(i) any valuation overstatement (within the meaning of section 6659(c)),

(ii) any loss disallowed by reason of section 465(a) and any credit disallowed under section 46(a)(8),

(iii) any straddle (as defined in section 1092(c) without regard to subsections (d) and (e) of section 1092),

(iv) any use of an accounting method specified in regulations prescribed by the Secretary as a use which may result in a substantial distortion of income for any period, and

(v) any sham or fraudulent transaction.

* * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND

(a) No suit prior to filing claim for refund.--No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in

that regard, and the regulations of the Secretary established in pursuance thereof.

* * * *

(h) Special rule for actions with respect to partnership items.—No action may be brought for a refund attributable to partnership items (as defined in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c).

SEC. 7441. STATUS

There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.

SEC. 7442. JURISDICTION

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

Federal Regulations
Effective for the Tax Years in Issue

Treas. Reg. §301.6621-2T. Questions and answers relating to the increased rate of interest on substantial underpayments attributable to certain tax motivated transactions (temporary).

The following questions and answers relate to the increased rate of interest on substantial underpayments attributable to certain tax motivated transactions as provided in section 6621(d) of the Internal Revenue Code of 1954, as added by section 144 of the Tax Reform Act of 1984 (Pub.L. 98-369, 98 Stat. 682):

* * * *

Q-5. How is the amount of a tax motivated underpayment determined?

A-5. Except as provided in A-6 of this section, the amount of a tax motivated underpayment is determined in the following manner:

(1) Calculate the amount of the tax liability for the taxable year as if all items of income, gain, loss, deduction, or credit, had been reported properly on the income tax return of the taxpayer ("total tax liability"); and

(2) Without taking into account any adjustments to items of income, gain, loss, deduction, or credit that are attributable to tax

motivated transactions (as defined in A-2 through A-4 of this section), calculate the amount of the tax liability for the taxable year as if all other items of income, gain, loss, deduction, or credit had been reported properly on the income tax return of the taxpayer ("tax liability without regard to tax motivated transactions").

(3) The difference between the total tax liability and the tax liability without regard to tax motivated transactions is the amount of the tax motivated underpayment.

Example. Taxpayer A, a calendar year taxpayer, files his 1984 income tax return reporting $70,000 of taxable income and $23,171 of tax liability. On January 20, 1986, A enters into a closing agreement with the Internal Revenue Service that includes the following adjustments:

Section 162 deduction disallowed (not tax motivated)	$ 7,500
Loss disallowed under section 465 (tax motivated--see A-2(2) of this section)	$ 5,000
Section 170 deduction disallowed because of a valuation overstatement (tax motivated--see A-2(1) of this section	$10,000

Loss disallowed with respect to a straddle as defined in section 1092(c) (tax motivated--see A-2(4) of this section ..... $ 7,000

Other adjustments (none of which are tax motivated) ..... $ 4,000

The tax motivated underpayment is determined in the following manner:

1.	$ 70,000	reported taxable income
	+ 33,500	(Add all adjustments to items of income, gain, loss, deduction, or credit (including tax motivated transactions subject to section 6621(d)))
	$103,500	Tax = $39,685 ("total tax liability")
2.	$ 70,000	reported taxable income
	+ 11,500	(Add adjustments to items of income, gain, loss, deduction, or credit other than those with respect to items that are tax motivated)
	$ 81,500	tax = $28,691 ("tax liability without regard to tax motivated transactions")

The tax motivated underpayment (*i.e.*, the underpayment attributable to tax motivated transactions) is $10,994 ($39,685–$28,691).

Accordingly, the interest on $10,994 would be computed at the 120 percent rate.

The remainder of the underpayment (*i.e.*, the underpayment not attributable to tax motivated transactions) is $5,520 ($28,691 (tax liability without regard to tax motivated items)–$23,171 (tax paid with return)). The interest on $5,520 would be computed at the adjusted rate.

Tax Court Rules

RULE 245. INTERVENTION AND PARTICIPATION

(a) Tax Matters Partner: The tax matters partner may intervene in an action for readjustment of partnership items brought by another partner or partners by filing a notice of election to intervene with the Court . . . . See Code sec. 6226(b)(2); Rule 241(d)(3).

(b) Other Partners: Any other partner who satisfies the requirements of Code §6226(d) or 6228(a)(4)(B) may participate in the action by filing a notice of election to participate with the Court . . . .

RULE 247. PARTIES

(a) In General: For purposes of this title of these Rules, the Commissioner, the partner who filed the petition, the tax matters partner, and each person who satisfies the requirements of Code

§6226(c) and (d) or 6228(a)(4) shall be treated as parties to the action.

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